ONTARIO
LABOUR RELATIONS BOARD
REPORTS

November/December 2008

Ontario

ONTARIO LABOUR RELATIONS BOARD

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**A Bimonthly Series of Decisions from the
Ontario Labour Relations Board**

Cited [2008] OLRB REP. NOVEMBER/DECEMBER

**EDITORS: VOY STELMASZYNSKI
LEONARD MARVY**

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Adjournment – Employment Standards – Judicial Review – Natural Justice – The Board had refused to grant an adjournment, given the lack of consent from the respondents and the prejudice to them – The applicant had had sufficient time to seek consent and the request had nothing to do with the lack of a document – The court found, given the lateness of the request, the lack of consent, the inconvenience to the responding parties, and the reason for the request (conflicting hearing dates), the Board's decision was not a denial of natural justice – The Board's decision to proceed on the merits was a reasonable one – Application dismissed

MISIR, DEVENDRANAUTH, A.K.A. DEV MISIR; RE MULUNESH F. AGAGO ET AL 863

Bar – Certification – Representation Vote – The employer and incumbent trade union took the position that the application for certification was barred because CUPE had applied seven weeks earlier for the same units – In the first set of applications the Board ordered a vote (sealing the ballots), but questioned whether there was an appearance of 40% because of undated cards – CUPE wrote requesting that the first applications be dismissed and the Board took this as a concession that there was not an appearance of more than 40% – The Board found no bar applicable to the present application since: the votes were not counted (a condition under s. 10); section 7(10) [withdrawal after a vote] did not apply, as the vote was a nullity since there was no evidence of an appearance of 40% – Additionally, since the employees' wishes had never been tested, and there have been no repetitious withdrawals, there was no reason to exercise the Board's discretion to bar the applicant – Matter continues

SODEXO CANADA LIMITED; RE CUPE; RE LIUNA Local 837 829

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SODEXO CANADA LIMITED; RE CUPE; RE LIUNA Local 837 829

Certification – Construction Industry – Evidence – Practice and Procedure – A key issue in dispute was whether G was at work on the application filing date – Although the employer's written submissions after the Regional Certification Meeting and its opening statement raised this issue, counsel failed to put to any of the applicant's five witnesses, including G, that it would be calling a witness to testify that G was not at work on the application filing date – When the employer's witness began testifying that G was not at work on the application filing date, union counsel raised the rule in *Browne v Dunn*, asking the Board to exclude the evidence – Although the Board accepted that the responding party had not abandoned its position and that the failure to cross-examine was

due to inadvertence, the Board did not find the circumstances supported the exercise of discretion to relieve against the application of the rule: the applicant did not contribute to the situation; the applicant would be significantly prejudiced; the calling of reply evidence (as a way to remedy the situation) would unnecessarily lengthen and complicate the proceeding; and the use of teleconference or video conference would not work with the witnesses that may have to be recalled – Accordingly, the Board sustained the applicant's motion and would not consider the evidence – Matter continues

HI-TEK DEV INC.; RE THE INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, LOCAL 1891 803

Certification – Construction Industry – Judicial Review – Reconsideration – The City sought judicial review of a Board decision certifying the carpenters, asserting that it never received proper notice of the application for certification because the union's documents were sent to a facsimile machine that was not monitored on a regular basis – The court held that the Board's decision was reasonable – The court specifically rejected the City's argument that there was an obligation on the Board to consider every late-filed response – The Court noted in any event that the Board had offered the City an opportunity to address the notice issue, but the City had failed to respond to the offer – The Board's treatment of two reconsideration requests was also found to be reasonable – Application dismissed

CITY OF HAMILTON; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 18 AND OLRB 859

Certification – Construction Industry – Judicial Review – Status – Trade Union – Local 183 challenged the CCWU's status as a construction industry trade union in a number of the CCWU's applications for certification – Although the Board found that the CCWU had status as a trade union pursuant to s. 1(1), it held that, absent a concluded collective agreement with an employer in the construction industry or other indicia of activity consistent with trade union practice that pertained to the construction industry, the applicant lacked status as a trade union in the construction industry pursuant to 126(1) – CCWU's lack of this status was fatal to the present applications for certification in the construction industry – The Board also found that section 15 did not apply to the applications for certification, as the consequences of any improper employer activity had no impact on the applications before the Board – On reconsideration, although successful, Local 183 asked the Board to reconsider its ruling on s. 15 – The Board noted that the applications were, for other reasons, dismissed and that, in any event, if section 15 were found to have applied, the result in these applications would have been the same – On judicial review the Court found the matter moot (no live issue between the parties) and further found no public interest in reviewing the Board's obiter comments on s. 15 – Judicial Review dismissed

CANADIAN CONSTRUCTION WORKERS UNION ET AL; RE UNIVERSAL WORKERS UNION, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183; AND OLRB 858

Certification – Construction Industry – Practice and Procedure – The Board considers whether it can and should accept a late-filed response to an application for certification – Corporate counsel for the responding party wrote to the Board on the due date, asking for an extension so that a labour lawyer could be consulted; the response was filed one day late – The Board analyzes the impact of the Court of Appeal's decision in *Maystar* [2008] OLRB Rep. March/April 306 and holds that because of the concluding paragraphs of that decision, the Divisional Court's ruling on the interpretation of s. 128.1(3) is not binding on the Board – The Board holds, however, that the Divisional Court's interpretation of the impugned section is persuasive: the word "shall" in s. 128.1(3) is directed at the employer, not the Board, and it should be interpreted in a directory and not a mandatory manner – A mandatory approach would lead to unfair results, and would require the Board to treat the various aspects of a late-filed response differently – Accordingly, the Board finds it does have the discretion to consider late-filed information under s. 128.1(3) – In exercising its discretion to accept the delayed response, the Board considers the length of the delay; how compelling the responding party's explanation of its delay is; and the prejudice to the applicant – The Board allows the late-filed response and refers the matter to a regional certification meeting

CHRISTINA HOMES LTD. AND/OR 1357202 ONTARIO LTD. AND/OR CHRISTINA WEST JOINT VENTURE; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183 749

Certification – Construction Industry – Practice and Procedure – The applicant, applying for certification with membership cards for Local 249, mistakenly named the Carpenters' Union, Central Ontario Regional Council (in which Local 249 is not a constituent member), instead of the Carpenters District Council of Ontario, as applicant – The Board, relying on s. 112, permitted the applicant to amend its name because: the change was not a substantive one; it was a *bona fide* mistake which created no advantage for the applicant nor any prejudice to the respondent; and the mistake did not affect the integrity of the membership evidence – Motion to amend allowed, matter continues

JENSEN BUILDING LTD.; RE CARPENTERS DISTRICT COUNCIL OF ONTARIO; UBCJA 812

Certification – Construction Industry – Practice and Procedure – The Board provides reasons for the acceptance a late-filed response to an application for certification – The applicant filed two very similar applications for certification with the responding party in close proximity; the responding party asserted that it did not receive the first application, and thought the hard copy material it received was a re-sending of the first application, when in fact it was a second application; nothing on the face of the new material identified for the responding party that this was a fresh application – The Board surveys its own case law, beginning with *Air Kool*, gives consideration to the court decisions in *Maystar*, and surveys other court rulings on the interpretation of "shall" – The Board concludes it is not bound by the Divisional Court's decision in *Maystar* because the Court of Appeal explicitly invited the Board to reconcile its jurisprudence – In considering whether it has the discretion to accept a late-filed response, the Board finds that an interpretation of the word 'shall' as directory in nature: (1) is consistent with and best ensures the attainment of the purposes of the Act; (2) eliminates the unintended consequences that result from concluding that the word is mandatory; (3) is consistent with establishing a common meaning for both the English and French texts of the Act; and (4) is consistent with the principles of natural justice – The Board finds that the responding party committed an innocent error in not recognizing that the applicant had filed two applications for certification, and the responding party acted promptly in rectifying the error once it learned of the true situation – Late response allowed

WEATHERTECH RESTORATION SERVICES INC.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL 832

Certification – Construction Industry – The OPDC (LIUNA) challenged the timing of CLAC's application on two grounds: (1) there were two earlier applications for certification filed by LIUNA in which there is some overlap in bargaining unit with the present application; and (2) the present application is barred because it relates to the same bargaining unit that was dismissed pursuant to s. 128.1(14)(e) in one of the two earlier applications – The Board allowed the instant application to proceed because the description of the bargaining unit in the earlier "live" application has not yet been determined – Furthermore, the Board found s. 128.1(15) to be analogous to s. 10(3) of the Act in that reference is made to individual employees in the bargaining unit, and not positions in the unit, so a unit with an entirely new complement of employees cannot be barred from proceeding – Matter continues

LOOBY CONSTRUCTION LIMITED; RE CONSTRUCTION WORKERS LOCAL 53 AFFILIATED WITH THE CHRISTIAN LABOUR ASSOCIATION OF CANADA; LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL 815

Certification – Construction Industry – The OPDC applied to certify employees of the responding party working on three projects in Board Area 4; the membership evidence was filed on behalf of Local 1081 – The responding party asserted that Local 1059 holds bargaining rights for labourers employed by the responding party in Board Area 3 by virtue of a voluntary recognition agreement, and any of its employees working outside the scope of the Board Area are bound by that agreement – The Board held that, absent a written agreement, it cannot find that a VRA exists – The Board further held that the gratuitous application of terms of a collective agreement does not bind the parties to that agreement – Finally, the Board found that since both Local 1059 and Local 1081 are constituent members of the applicant, the manner in which the applicant collected membership evidence from the employees was irrelevant to the disposition of the application since the employees were already members of the applicant – Certificate issued

PACHECOS CONTRACTORS LTD.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL 820

Certification – Construction Industry – The union sought to withdraw its challenges to the employer's list following a representation vote and requested, in addition, that the Board dismiss the application without a bar, pursuant to the employer's s. 8.1 notice, because the union acknowledged that it had less than 40% support of the individuals in the bargaining unit – The union, however, had already agreed to a bargaining unit that had the support of 41% of the employees in it – The Board held that the union could not invoke s. 8.1 of the Act after it had agreed the number of employees in the bargaining unit was more than 40%, and after a representation vote had been held – The Board determined that the application must be dismissed either under 10(2) or 7(10) of the Act

EXCEL STEEL LTD.; SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION LOCAL 540 778

Certification – Judicial Review – Representation Vote – The employer sought judicial review of a Board decision ordering a vote, arguing that it had not been served with the application for certification – The Board had found that the union faxed the application to a number provided to it by a representative of the employer – The court held the Board's decision was reasonable in the circumstances and there was no denial of natural justice – Application for judicial review dismissed

EDGEWATER GARDENS LONG TERM CARE CENTRE; RE OPSEU AND OLRB.... 865

Conflict of Interest – Construction Industry – Practice and Procedure – Related Employer – Sale of Business – The Formwork Council, relying on the interests of its affiliate Local 183, brought a motion to have C removed as counsel for CCWU, as C had acted for Local 183 in proceedings before the Board, the court and an Independent Hearings Officer, in the feud between LIUNA and Local 183 – The motion was based on the possibility that since C received confidential information he would now be in a position to use it against Local 183 or that he owed a duty of loyalty to Local 183 – First, the Board found that the application will be decided on the existence of a collective agreement (or the abandonment of bargaining rights), both matters which turn on the specific facts before the Board and not on some past, internal standard that may have been set by Local 183 – Accordingly the Board found there was no possibility that the factual or legal issues of this case could give rise to any possibility that confidential information that C obtained during his Original Retainer would be in any way connected to or relevant to the application – Second, the Board found that the duty of loyalty is only engaged if the lawyer acts against the former client in a later action with respect to matters that relate to the factual and legal issues that arose in the Original Retainer – The Board found that the facts relevant to this case do not require C to revisit or deal with any issues in respect of which he acted for Local 183 during the trusteeship application – Motion to disqualify dismissed – Matter continues

GOTHAM STRUCTURAL GROUP INC. AND DUROCAST STRUCTURAL GROUP INC; RE THE FORMWORK COUNCIL OF ONTARIO; RE CANADIAN CONSTRUCTION WORKERS UNION (December 22, 2008) 785

Conflict of Interest – Practice and Procedure – The Board noted that there has been an increase in the frequency of motions to remove counsel of record from particular applications due to alleged conflicts of interest – The Board held that such allegations are serious challenges to a lawyer's professionalism and should not be treated casually – Assuming a role analogous to the Superior Court in similar circumstances, the Board in the instant case issued a direction and schedule for the exchange and delivery of declarations as to the facts (and supporting documents) on which the parties rely in the motion – Matter continues

GOTHAM STRUCTURAL GROUP INC. AND DUROCAST STRUCTURAL GROUP INC.; RE THE FORMWORK COUNCIL OF ONTARIO; RE CANADIAN CONSTRUCTION WORKERS UNION (November 5, 2008).. 781

Construction Industry – Certification – Evidence – Practice and Procedure – A key issue in dispute was whether G was at work on the application filing date – Although the employer's written submissions after the Regional Certification Meeting and its opening statement raised this issue, counsel failed to put to any of the applicant's five witnesses, including G, that it would be calling a witness to testify that G was not at work on the application filing date – When the employer's witness began testifying that G was not at work on the application filing date, union counsel raised the rule in *Browne v Dunn*, asking the Board to exclude the evidence – Although the Board accepted that the responding party had not abandoned its position and that the failure to cross-examine was due to inadvertence, the Board did not find the circumstances supported the exercise of discretion to relieve against the application of the rule: the applicant did not contribute to the situation; the applicant would be significantly prejudiced; the calling of reply evidence (as a way to remedy the situation) would unnecessarily lengthen and complicate the proceeding; and the use of teleconference or video conference would not work with the witnesses that may have to be recalled – Accordingly, the Board sustained the applicant's motion and would not consider the evidence – Matter continues

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PACHECOS CONTRACTORS LTD.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL 820

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GOTHAM STRUCTURAL GROUP INC. AND DUROCAST STRUCTURAL GROUP INC; RE THE FORMWORK COUNCIL OF ONTARIO; RE CANADIAN CONSTRUCTION WORKERS UNION (December 22, 2008) 785

Discharge – Interim Relief – Remedies – Unfair Labour Practice – The union sought interim reinstatement of two working foremen and two labourers – The employer claimed that the individuals were disciplined because the project was progressing too slowly and that they were laid-off because there was a lack of work – The Board first determined whether there was a causal relationship between the layoffs and the exercise of a right under the Act – The Board found no appearance of a causal connection between the layoffs of the two short service labourers and the exercise of a right, because almost half the workforce had been laid off during the relevant time and it was reasonable that the two labourers would have been laid off – The Board did find an appearance of a causal relationship between the layoffs of the two working foremen and their support for the union based on: the timing of the company's conduct; the company's inconsistent conduct with prior practices; the frequency of such conduct with prior practice and the unreasonableness of it when viewed in context – Concerning irreparable harm, the Board found it was reasonable to infer that laying-off the two working foremen would make employees afraid to testify in the upcoming hearing regarding who was in the bargaining unit – Finally, the Board held that the balance of harm to the union was considerable since the lay-offs undermined the Union's campaign at the very time it needed to call evidence before the Board – Interim order granted

CORNERSTONE STRUCTURAL RESTORATION INC.; RE OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL UNION OF THE UNITED STATES AND CANADA, LOCAL 598 760

Duty of Fair Representation – Employment Standards – The employee alleged unfair treatment at the union's hands when it failed to pursue a grievance on his behalf for termination and severance pay – The employee, following a lay-off of 34 weeks, was recalled to work and shortly thereafter elected to take a "preferred lay-off" under the collective agreement and resigned his employment – He then asked the union to assist him in obtaining his entitlements under the *Employment Standards Act* – The union sought advice from the Ministry of Labour as well as its own counsel with respect to the employee's entitlements – Both the ministry and the union's lawyer stated that an employee who elects to take a preferential lay-off cannot use those weeks toward severance entitlements – The applicant was subsequently advised by the ministry that a preferred lay-off did constitute a lay-off under the ESA – The Board, without deciding if the advice the union received and subsequently conveyed to the applicant was correct, found that it was not so wrong as to be arbitrary – Application dismissed

SCOTT WAYLAND; RE THOMPSON PRODUCTS EMPLOYEES' ASSOCIATION ... 825

Employment Standards – Adjournment – Judicial Review – Natural Justice – The Board had refused to grant an adjournment, given the lack of consent from the respondents and the prejudice to them – The applicant had had sufficient time to seek consent and the request had nothing to do with the lack of a document – The court found, given the lateness of the request, the lack of consent, the inconvenience to the responding parties, and the reason for the request (conflicting hearing dates), the Board's decision was not a denial of natural justice – The Board's decision to proceed on the merits was a reasonable one – Application dismissed

MISIR, DEVENDRANAUTH, A.K.A. DEV MISIR; RE MULUNESH F. AGAGO ET AL.. 863

Employment Standards – Duty of Fair Representation – The employee alleged unfair treatment at the union's hands when it failed to pursue a grievance on his behalf for termination and severance pay – The employee, following a lay-off of 34 weeks, was recalled to work and shortly thereafter elected to take a "preferred lay-off" under the collective agreement and resigned his employment – He then asked the union to assist him in obtaining his entitlements under the *Employment Standards Act* – The union sought advice from the Ministry of Labour as well as its own counsel with respect to the employee's entitlements – Both the ministry and the union's lawyer stated that an employee who elects to take a preferential lay-off cannot use those weeks toward severance entitlements – The applicant was subsequently advised by the ministry that a preferred lay-off did constitute a lay-off under the ESA – The Board, without deciding if the advice the union received and subsequently conveyed to the applicant was correct, found that it was not so wrong as to be arbitrary – Application dismissed

SCOTT WAYLAND; RE THOMPSON PRODUCTS EMPLOYEES' ASSOCIATION ... 825

Employment Standards – The Board found that a six-year employee with a regular work week of thirty-five hours who had his hours reduced to eight per week, with the concomitant diminution in pay, was constructively dismissed – There was no implied term or condition in his employment relationship that suggested or anticipated such a dramatic cut, and this was not a lay-off – The employee's subsequent resignation was found to be a reasonable response initiated within a reasonable time of the implemented changes, in accordance with s. 56(1)(c) of the Act –Application granted

DR. MICHAEL BLACKMORE AND DIRECTOR OF EMPLOYMENT STANDARDS; RE JOHN DANIELS.. 772

Evidence – Certification – Construction Industry – Practice and Procedure – A key issue in dispute was whether G was at work on the application filing date – Although the employer's written submissions after the Regional Certification Meeting and its opening statement raised this issue, counsel failed to put to any of the applicant's five witnesses, including G, that it would be calling a witness to testify that G was not at work on the application filing date – When the employer's witness began testifying that G was not at work on the application filing date, union counsel raised the rule in *Browne v Dunn*, asking the Board to exclude the evidence – Although the Board accepted that the responding party had not abandoned its position and that the failure to cross-examine was due to inadvertence, the Board did not find the circumstances supported the exercise of discretion to relieve against the application of the rule: the applicant did not contribute to the situation; the applicant would be significantly prejudiced; the calling of reply evidence (as a way to remedy the situation) would unnecessarily lengthen and complicate the proceeding; and the use of teleconference or video conference would not work with the witnesses that may have to be recalled – Accordingly, the Board sustained the applicant's motion and would not consider the evidence – Matter continues

HI-TEK DEV INC.; RE THE INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, LOCAL 1891 803

Health and Safety – Timeliness – The applicant filed a request for suspension of an inspector's order on Form A-67 twenty-nine days after the order was issued, but did not file an appeal of the order within the 30-day time limit set out in s. 61(1) of the *Occupational Health and Safety Act* – The issue before the Board was whether the appeal was timely – The Board found that all the information required to initiate an appeal was contained in Form A-67, and the Board's Rules of Procedure allow it to relieve against the strict application of the Rules – The Board relieved against the strict application of Rule 22.1 which requires an appeal to be launched on Form A-65 – The late-filed form was viewed as an amendment of the timely appeal filed four days earlier – Matter proceeds

DYNAMIC PROPERTIES INC.; RE RICK CARPENTER, JOSIE ROQUE AND DAVE MACDONALD, INSPECTOR.. 775

Interim Relief – Discharge – Remedies – Unfair Labour Practice – The union sought interim reinstatement of two working foremen and two labourers – The employer claimed that the individuals were disciplined because the project was progressing too slowly and that they were laid-off because there was a lack of work – The Board first determined whether there was a causal relationship between the layoffs and the exercise of a right under the Act – The Board found no appearance of a causal connection between the layoffs of the two short service labourers and the exercise of a right, because almost half the workforce had been laid off during the relevant time and it was reasonable that the two labourers would have been laid off – The Board did find an appearance of a causal relationship between the layoffs of the two working foremen and their support for the union based on: the timing of the company's conduct; the company's inconsistent conduct with prior practices; the frequency of such conduct with prior practice and the unreasonableness of it when viewed in context – Concerning irreparable harm, the Board found it was reasonable to infer that laying-off the two working foremen would make employees afraid to testify in the upcoming hearing regarding who was in the bargaining unit – Finally, the Board held that the balance of harm to the union was considerable since the lay-offs undermined the Union's campaign at the very time it needed to call evidence before the Board – Interim order granted

CORNERSTONE STRUCTURAL RESTORATION INC.; RE OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL UNION OF THE UNITED STATES AND CANADA, LOCAL 598 760

Judicial Review – Adjournment – Employment Standards – Natural Justice – The Board had refused to grant an adjournment, given the lack of consent from the respondents and the prejudice to them – The applicant had had sufficient time to seek consent and the request had nothing to do with the lack of a document – The court found, given the lateness of the request, the lack of consent, the inconvenience to the responding parties, and the reason for the request (conflicting hearing dates), the Board's decision was not a denial of natural justice – The Board's decision to proceed on the merits was a reasonable one – Application dismissed

MISIR, DEVENDRANAUTH, A.K.A. DEV MISIR; RE MULUNESH F. AGAGO ET AL.. 863

Judicial Review – Certification – Construction Industry – Reconsideration – The City sought judicial review of a Board decision certifying the carpenters, asserting that it never received proper notice of the application for certification because the union's documents were sent to a facsimile machine that was not monitored on a regular basis – The court held that the Board's decision was reasonable – The court specifically rejected the City's argument that there was an obligation on the Board to consider every late-filed response – The Court noted in any event that the Board had offered the City an opportunity to address the notice issue, but the City had failed to respond to the offer – The Board's treatment of two reconsideration requests was also found to be reasonable – Application dismissed

CITY OF HAMILTON; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 18 AND OLRB 859

Judicial Review – Certification – Construction Industry – Status – Trade Union – Local 183 challenged the CCWU's status as a construction industry trade union in a number of the CCWU's applications for certification – Although the Board found that the CCWU had status as a trade union pursuant to s. 1(1), it held that, absent a concluded collective agreement with an employer in the construction industry or other indicia of activity consistent with trade union practice that pertained to the construction industry, the applicant lacked status as a trade union in the construction industry pursuant to 126(1) – CCWU's lack of this status was fatal to the present applications for certification in the construction industry – The Board also found that section 15 did not apply to the applications for certification, as the consequences of any improper employer activity had no impact on the applications before the Board – On reconsideration, although successful, Local 183 asked the Board to reconsider its ruling on s. 15 – The Board noted that the applications were, for other reasons, dismissed and that, in any event, if section 15 were found to have applied, the result in these applications would have been the same – On judicial review the Court found the matter moot (no live issue between the parties) and further found no public interest in reviewing the Board's obiter comments on s. 15 – Judicial Review dismissed

CANADIAN CONSTRUCTION WORKERS UNION ET AL; RE UNIVERSAL WORKERS UNION, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183; AND OLRB 858

Judicial Review – Certification – Representation Vote – The employer sought judicial review of a Board decision ordering a vote, arguing that it had not been served with the application for certification – The Board had found that the union faxed the application to a number provided to it by a representative of the employer – The court held the Board's decision was reasonable in the circumstances and there was no denial of natural justice – Application for judicial review dismissed

EDGEWATER GARDENS LONG TERM CARE CENTRE; RE OPSEU AND OLRB.... 865

Natural Justice – Adjournment – Employment Standards – Judicial Review – The Board had refused to grant an adjournment, given the lack of consent from the respondents and the prejudice to them – The applicant had had sufficient time to seek consent and the request had nothing to do with the lack of a document – The court found, given the lateness of the request, the lack of consent, the inconvenience to the responding parties, and the reason for the request (conflicting hearing dates), the Board's decision was not a denial of natural justice – The Board's decision to proceed on the merits was a reasonable one – Application dismissed

MISIR, DEVENDRANAUTH, A.K.A. DEV MISIR; RE MULUNESH F. AGAGO ET AL.. 863

Practice and Procedure – Certification – Construction Industry – The Board considers whether it can and should accept a late-filed response to an application for certification – Corporate counsel for the responding party wrote to the Board on the due date, asking for an extension so that a labour lawyer could be consulted; the response was filed one day late – The Board analyzes the impact of the Court of Appeal's decision in *Maystar* [2008] OLRB Rep. March/April 306 and holds that because of the concluding paragraphs of that decision, the Divisional Court's ruling on the interpretation of s. 128.1(3) is not binding on the Board – The Board holds, however, that the Divisional Court's interpretation of the impugned section is persuasive: the word "shall" in s. 128.1(3) is directed at the employer, not the Board, and it should be interpreted in a directory and not a mandatory manner – A mandatory approach would lead to unfair results, and would require the Board to treat the various aspects of a late-filed response differently – Accordingly, the Board finds it does have the discretion to consider late-filed information under s. 128.1(3) – In exercising its discretion to accept the delayed response, the Board considers the length of the delay; how compelling the responding party's explanation of its delay is; and the prejudice to the applicant – The Board allows the late-filed response and refers the matter to a regional certification meeting

CHRISTINA HOMES LTD. AND/OR 1357202 ONTARIO LTD. AND/OR CHRISTINA WEST JOINT VENTURE; RE UNIVERSAL WORKERS UNION, LIUNA, LOCAL 183 749

Practice and Procedure – Certification – Construction Industry – Evidence – A key issue in dispute was whether G was at work on the application filing date – Although the employer's written submissions after the Regional Certification Meeting and its opening statement raised this issue, counsel failed to put to any of the applicant's five witnesses, including G, that it would be calling a witness to testify that G was not at work on the application filing date – When the employer's witness began testifying that G was not at work on the application filing date, union counsel raised the rule in *Browne v Dunn*, asking the Board to exclude the evidence – Although the Board accepted that the responding party had not abandoned its position and that the failure to cross-examine was due to inadvertence, the Board did not find the circumstances supported the exercise of discretion to relieve against the application of the rule: the applicant did not contribute to the situation; the applicant would be significantly prejudiced; the calling of reply evidence (as a way to remedy the situation) would unnecessarily lengthen and complicate the proceeding; and the use of teleconference or video conference would not work with the witnesses that may have to be recalled – Accordingly, the Board sustained the applicant's motion and would not consider the evidence – Matter continues

HI-TEK DEV INC.; RE THE INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, LOCAL 1891 803

Practice and Procedure – Certification – Construction Industry – The applicant, applying for certification with membership cards for Local 249, mistakenly named the Carpenters' Union, Central Ontario Regional Council (in which Local 249 is not a constituent member), instead of the Carpenters District Council of Ontario, as applicant – The Board, relying on s. 112, permitted the applicant to amend its name because: the change was not a substantive one; it was a *bona fide* mistake which created no advantage for the applicant nor any prejudice to the respondent; and the mistake did not affect the integrity of the membership evidence – Motion to amend allowed, matter continues

JENSEN BUILDING LTD.; RE CARPENTERS DISTRICT COUNCIL OF ONTARIO; UBCJA 812

Practice and Procedure – Certification – Construction Industry – The Board provides reasons for the acceptance a late-filed response to an application for certification – The applicant filed two very similar applications for certification with the responding party in close proximity; the responding party asserted that it did not receive the first application, and thought the hard copy material it received was a re-sending of the first application, when in fact it was a second application; nothing on the face of the new material identified for the responding party that this was a fresh application – The Board surveys its own case law, beginning with *Air Kool*, gives consideration to the court decisions in *Maystar*, and surveys other court rulings on the interpretation of "shall" – The Board concludes it is not bound by the Divisional Court's decision in *Maystar* because the Court of Appeal explicitly invited the Board to reconcile its jurisprudence – In considering whether it has the discretion to accept a late-filed response, the Board finds that an interpretation of the word 'shall' as directory in nature: (1) is consistent with and best ensures the attainment of the purposes of the Act; (2) eliminates the unintended consequences that result from concluding that the word is mandatory; (3) is consistent with establishing a common meaning for both the English and French texts of the Act; and (4) is consistent with the principles of natural justice – The Board finds that the responding party committed an innocent error in not recognizing that the applicant had filed two applications for certification, and the responding party acted promptly in rectifying the error once it learned of the true situation – Late response allowed

WEATHERTECH RESTORATION SERVICES INC.; RE LIUNA, ONTARIO PROVINCIAL DISTRICT COUNCIL 832

Practice and Procedure – Conflict of Interest – The Board noted that there has been an increase in the frequency of motions to remove counsel of record from particular applications due to alleged conflicts of interest – The Board held that such allegations are serious challenges to a lawyer's professionalism and should not be treated casually – Assuming a role analogous to the Superior Court in similar circumstances, the Board in the instant case issued a direction and schedule for the exchange and delivery of declarations as to the facts (and supporting documents) on which the parties rely in the motion – Matter continues

GOTHAM STRUCTURAL GROUP INC. AND DUROCAST STRUCTURAL GROUP INC.; RE THE FORMWORK COUNCIL OF ONTARIO; RE CANADIAN CONSTRUCTION WORKERS UNION (November 5, 2008) 781

Practice and Procedure – Construction Industry – Conflict of Interest – Related Employer – Sale of Business – The Formwork Council, relying on the interests of its affiliate Local 183, brought a motion to have C removed as counsel for CCWU, as C had acted for Local 183 in proceedings before the Board, the court and an Independent Hearings Officer, in the feud between LIUNA and Local 183 – The motion was based on the possibility that since C received confidential information he would now be in a position to use it against Local 183 or that he owed a duty of loyalty to Local 183 – First, the Board found that the application will be decided on the existence of a collective agreement (or the abandonment of bargaining rights), both matters which turn on the specific facts before the Board and not on some past, internal standard that may have been set by Local 183 – Accordingly the Board found there was no possibility that the factual or legal issues of this case could give rise to any possibility that confidential information that C obtained during his Original Retainer would be in any way connected to or relevant to the application – Second, the Board found that the duty of loyalty is only engaged if the lawyer acts against the former client in a later action with respect to matters that relate to the factual and legal issues that arose in the Original Retainer – The Board found that the facts relevant to this case do not require C to revisit or deal with any issues in respect of which he acted for Local 183 during the trusteeship application – Motion to disqualify dismissed – Matter continues

GOTHAM STRUCTURAL GROUP INC. AND DUROCAST STRUCTURAL GROUP INC; RE THE FORMWORK COUNCIL OF ONTARIO; RE CANADIAN CONSTRUCTION WORKERS UNION (December 22, 2008) 785

Reconsideration – Certification – Construction Industry – Judicial Review – The City sought judicial review of a Board decision certifying the carpenters, asserting that it never received proper notice of the application for certification because the union's documents were sent to a facsimile machine that was not monitored on a regular basis – The court held that the Board's decision was reasonable – The court specifically rejected the City's argument that there was an obligation on the Board to consider every late-filed response – The Court noted in any event that the Board had offered the City an opportunity to address the notice issue, but the City had failed to respond to the offer – The Board's treatment of two reconsideration requests was also found to be reasonable – Application dismissed

CITY OF HAMILTON; RE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 18 AND OLRB 859

Related Employer – Construction Industry – Conflict of Interest – Practice and Procedure – Sale of Business – The Formwork Council, relying on the interests of its affiliate Local 183, brought a motion to have C removed as counsel for CCWU, as C had acted for Local 183 in proceedings before the Board, the court and an Independent Hearings Officer, in the feud between LIUNA and Local 183 – The motion was based on the possibility that since C received confidential information he would now be in a position to use it against Local 183 or that he owed a duty of loyalty to Local 183 – First, the Board found that the application will be decided on the existence of a collective agreement (or the abandonment of bargaining rights), both matters which turn on the specific facts before the Board and not on some past, internal standard that may have been set by Local 183 – Accordingly the Board found there was no possibility that the factual or legal issues of this case could give rise to any possibility that confidential information that C obtained during his Original Retainer would be in any way connected to or relevant to the application – Second, the Board found that the duty of loyalty is only engaged if the lawyer acts against the former client in a later action with respect to matters that relate to the factual and legal issues that arose in the Original Retainer – The Board found that the facts relevant to this case do not require C to revisit or deal with any issues in respect of which he acted for Local 183 during the trusteeship application – Motion to disqualify dismissed – Matter continues

GOTHAM STRUCTURAL GROUP INC. AND DUROCAST STRUCTURAL GROUP INC; RE THE FORMWORK COUNCIL OF ONTARIO; RE CANADIAN CONSTRUCTION WORKERS UNION (December 22, 2008) 785

Remedies – Discharge – Interim Relief – Unfair Labour Practice – The union sought interim reinstatement of two working foremen and two labourers – The employer claimed that the individuals were disciplined because the project was progressing too slowly and that they were laid-off because there was a lack of work – The Board first determined whether there was a causal relationship between the layoffs and the exercise of a right under the Act – The Board found no appearance of a causal connection between the layoffs of the two short service labourers and the exercise of a right, because almost half the workforce had been laid off during the relevant time and it was reasonable that the two labourers would have been laid off – The Board did find an appearance of a causal relationship between the layoffs of the two working foremen and their support for the union based on: the timing of the company's conduct; the company's inconsistent conduct with prior practices; the frequency of such conduct with prior practice and the unreasonableness of it when viewed in context – Concerning irreparable harm, the Board found it was reasonable to infer that laying-off the two working foremen would make employees afraid to testify in the upcoming hearing regarding who was in the bargaining unit – Finally, the Board held that the balance of harm to the union was considerable since the lay-offs undermined the Union's campaign at the very time it needed to call evidence before the Board – Interim order granted

CORNERSTONE STRUCTURAL RESTORATION INC.; RE OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL UNION OF THE UNITED STATES AND CANADA, LOCAL 598 760

Representation Vote – Bar – Certification – The employer and incumbent trade union took the position that the application for certification was barred because CUPE had applied seven weeks earlier for the same units – In the first set of applications the Board ordered a vote (sealing the ballots), but questioned whether there was an appearance of 40% because of undated cards – CUPE wrote requesting that the first applications be dismissed and the Board took this as a concession that there was not an appearance of more than 40% – The Board found no bar applicable to the present application since: the votes were not counted (a condition under s. 10); section 7(10) [withdrawal after a vote] did not apply, as the vote was a nullity since there was no evidence of an appearance of 40% – Additionally, since the employees' wishes had never been tested, and there have been no repetitious withdrawals, there was no reason to exercise the Board's discretion to bar the applicant – Matter continues

SODEXO CANADA LIMITED; RE CUPE; RE LIUNA Local 837 829

Representation Vote – Certification – Judicial Review – The employer sought judicial review of a Board decision ordering a vote, arguing that it had not been served with the application for certification – The Board had found that the union faxed the application to a number provided to it by a representative of the employer – The court held the Board's decision was reasonable in the circumstances and there was no denial of natural justice – Application for judicial review dismissed

EDGEWATER GARDENS LONG TERM CARE CENTRE; RE OPSEU AND OLRB.... 865

Sale of Business – Construction Industry – Conflict of Interest – Practice and Procedure – Related Employer – The Formwork Council, relying on the interests of its affiliate Local 183, brought a motion to have C removed as counsel for CCWU, as C had acted for Local 183 in proceedings before the Board, the court and an Independent Hearings Officer, in the feud between LIUNA and Local 183 – The motion was based on the possibility that since C received confidential information he would now be in a position to use it against Local 183 or that he owed a duty of loyalty to Local 183 – First, the Board found that the application will be decided on the existence of a collective agreement (or the abandonment of bargaining rights), both matters which turn on the specific facts before the Board and not on some past, internal standard that may have

been set by Local 183 – Accordingly the Board found there was no possibility that the factual or legal issues of this case could give rise to any possibility that confidential information that C obtained during his Original Retainer would be in any way connected to or relevant to the application – Second, the Board found that the duty of loyalty is only engaged if the lawyer acts against the former client in a later action with respect to matters that relate to the factual and legal issues that arose in the Original Retainer – The Board found that the facts relevant to this case do not require C to revisit or deal with any issues in respect of which he acted for Local 183 during the trusteeship application – Motion to disqualify dismissed – Matter continues

GOTHAM STRUCTURAL GROUP INC. AND DUROCAST STRUCTURAL GROUP INC; RE THE FORMWORK COUNCIL OF ONTARIO; RE CANADIAN CONSTRUCTION WORKERS UNION (December 22, 2008) 785

Status – Certification – Construction Industry – Judicial Review – Trade Union – Local 183 challenged the CCWU's status as a construction industry trade union in a number of the CCWU's applications for certification – Although the Board found that the CCWU had status as a trade union pursuant to s. 1(1), it held that, absent a concluded collective agreement with an employer in the construction industry or other indicia of activity consistent with trade union practice that pertained to the construction industry, the applicant lacked status as a trade union in the construction industry pursuant to 126(1) – CCWU's lack of this status was fatal to the present applications for certification in the construction industry – The Board also found that section 15 did not apply to the applications for certification, as the consequences of any improper employer activity had no impact on the applications before the Board – On reconsideration, although successful, Local 183 asked the Board to reconsider its ruling on s. 15 – The Board noted that the applications were, for other reasons, dismissed and that, in any event, if section 15 were found to have applied, the result in these applications would have been the same – On judicial review the Court found the matter moot (no live issue between the parties) and further found no public interest in reviewing the Board's obiter comments on s. 15 – Judicial Review dismissed

CANADIAN CONSTRUCTION WORKERS UNION ET AL; RE UNIVERSAL WORKERS UNION, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183; AND OLRB 858

Timeliness – Health and Safety – The applicant filed a request for suspension of an inspector's order on Form A-67 twenty-nine days after the order was issued, but did not file an appeal of the order within the 30-day time limit set out in s. 61(1) of the *Occupational Health and Safety Act* – The issue before the Board was whether the appeal was timely – The Board found that all the information required to initiate an appeal was contained in Form A-67, and the Board's Rules of Procedure allow it to relieve against the strict application of the Rules – The Board relieved against the strict application of Rule 22.1 which requires an appeal to be launched on Form A-65 – The late-filed form was viewed as an amendment of the timely appeal filed four days earlier – Matter proceeds

DYNAMIC PROPERTIES INC.; RE RICK CARPENTER, JOSIE ROQUE AND DAVE MACDONALD, INSPECTOR.. 775

Trade Union – Certification – Construction Industry – Judicial Review – Status – Local 183 challenged the CCWU's status as a construction industry trade union in a number of the CCWU's applications for certification – Although the Board found that the CCWU had status as a trade union pursuant to s. 1(1), it held that, absent a concluded collective

agreement with an employer in the construction industry or other indicia of activity consistent with trade union practice that pertained to the construction industry, the applicant lacked status as a trade union in the construction industry pursuant to 126(1) – CCWU's lack of this status was fatal to the present applications for certification in the construction industry – The Board also found that section 15 did not apply to the applications for certification, as the consequences of any improper employer activity had no impact on the applications before the Board – On reconsideration, although successful, Local 183 asked the Board to reconsider its ruling on s. 15 – The Board noted that the applications were, for other reasons, dismissed and that, in any event, if section 15 were found to have applied, the result in these applications would have been the same – On judicial review the Court found the matter moot (no live issue between the parties) and further found no public interest in reviewing the Board's obiter comments on s. 15 – Judicial Review dismissed

CANADIAN CONSTRUCTION WORKERS UNION ET AL; RE UNIVERSAL WORKERS UNION, LABOURERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 183; AND OLRB 858

Unfair Labour Practice – Discharge – Interim Relief – Remedies – The union sought interim reinstatement of two working foremen and two labourers – The employer claimed that the individuals were disciplined because the project was progressing too slowly and that they were laid-off because there was a lack of work – The Board first determined whether there was a causal relationship between the layoffs and the exercise of a right under the Act – The Board found no appearance of a causal connection between the layoffs of the two short service labourers and the exercise of a right, because almost half the workforce had been laid off during the relevant time and it was reasonable that the two labourers would have been laid off – The Board did find an appearance of a causal relationship between the layoffs of the two working foremen and their support for the union based on: the timing of the company's conduct; the company's inconsistent conduct with prior practices; the frequency of such conduct with prior practice and the unreasonableness of it when viewed in context – Concerning irreparable harm, the Board found it was reasonable to infer that laying-off the two working foremen would make employees afraid to testify in the upcoming hearing regarding who was in the bargaining unit – Finally, the Board held that the balance of harm to the union was considerable since the lay-offs undermined the Union's campaign at the very time it needed to call evidence before the Board – Interim order granted

CORNERSTONE STRUCTURAL RESTORATION INC.; RE OPERATIVE PLASTERERS' AND CEMENT MASONS' INTERNATIONAL UNION OF THE UNITED STATES AND CANADA, LOCAL 598 760

1834-08-R Universal Workers Union, Labourers' International Union of North America Local 183, Applicant v. **Christina Homes Ltd. and/or 1357202 Ontario Ltd. and/or Christina West Joint Venture**, Responding Party

Certification – Construction Industry – Practice and Procedure – The Board considers whether it can and should accept a late-filed response to an application for certification – Corporate counsel for the responding party wrote to the Board on the due date, asking for an extension so that a labour lawyer could be consulted; the response was filed one day late – The Board analyzes the impact of the Court of Appeal's decision in *Maystar* [2008] OLRB Rep. March/April 306 and holds that because of the concluding paragraphs of that decision, the Divisional Court's ruling on the interpretation of s. 128.1(3) is not binding on the Board – The Board holds, however, that the Divisional Court's interpretation of the impugned section is persuasive: the word "shall" in s. 128.1(3) is directed at the employer, not the Board, and it should be interpreted in a directory and not a mandatory manner – A mandatory approach would lead to unfair results, and would require the Board to treat the various aspects of a late-filed response differently – Accordingly, the Board finds it does have the discretion to consider late-filed information under s. 128.1(3) – In exercising its discretion to accept the delayed response, the Board considers the length of the delay; how compelling the responding party's explanation of its delay is; and the prejudice to the applicant – The Board allows the late-filed response and refers the matter to a regional certification meeting

BEFORE: *Marilyn Silverman*, Vice-Chair.

DECISION OF THE BOARD: November 20, 2008

1. This is an application for certification filed under section 128.1 of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act").

2. This decision deals with whether the Board should accept a late filed response, which includes the information filed under section 128.1(3) of the Act ("the late filed information"). The issue is whether the Board has discretion to accept that information and whether it should exercise that discretion in this case.

The Facts

3. Universal Workers Union, Labourers' International Union of North America Local 183 filed an application for certification on Friday, September 12, 2008. It served the president of the responding parties, Christina Homes Ltd. and/or 1357202 Ontario Ltd. and/or Christina West Joint Venture ("the responding party") with the application and accompanying material on Monday, September 15, 2008 by facsimile transmission.

4. On Tuesday, September 16, 2008 the Board faxed its confirmation of filing of the application. The principal of the responding party does not dispute that he received the application and the confirmation of filing. The responding party asserts that it contacted its lawyer, not a labour lawyer, upon receiving the application on September 15, 2008. The lawyer advised that he was not available to meet until the afternoon of September 17, 2008.

5. The response was due on Wednesday, September 17, 2008.

6. The principal of the responding party met with his then counsel at 1:00 p.m. on September 17, 2008.

7. By fax received by the Board at 3:08 p.m. on September 17, 2008 then counsel for the responding party requested an extension of time for filing the response noting that it sought that extension so as to contact labour counsel.

8. By decision dated September 17, 2008, the Board (differently constituted) declined to grant the extension noting that an attempt to file a late response would be dealt with once such a response was filed. Further, that panel advised the responding party that it had until midnight to file information required by section 128.1(3).

9. A response was filed on September 18, 2008 at 4:30 p.m. There is no dispute that the response was filed one day late.

10. The substantive dispute between the parties concerns a related employer issue and the number of employees in the bargaining unit. The applicant says there are two; the responding party contends there are five.

11. I sought submissions from the parties on the Board's discretion to accept the late filed response including the late filed information. Both parties have filed full submissions.

The Statute and the Rules:

12. The time frames relevant to this determination are found in section 128.1(3) of the Act, Rules 25.5 and 40.7.

13. Section 128.1(3) provides:

> (3) Within two days (excluding Saturdays, Sundays and holidays) after receiving notice under subsection (2), the employer shall provide the Board with,
>
> (a) the names of the employees in the bargaining unit proposed in the application, as of the date the application is filed; and
>
> (b) if the employer gives the Board a written description of the bargaining unit that the employer proposes, in accordance with subsection 7(14), the names of the employees in that proposed bargaining unit, as of the date the application is filed.

14. The applicant refers as well to Section 128.1(4) which reads:

> (4) On receiving an application for certification from a trade union that has elected to have its application dealt with under this section, the Board shall determine, as of the date the application is filed and on the basis of the information provided in or with the application and under subsection (3),
>
> (a) the bargaining unit; and

> (b) the percentage of employees in the bargaining unit who are members of the trade union.

15. Rules 25.5 and 40.7 provide:

> **25.5** A responding party must file a response to the application, including Schedule A, not later than two (2) days after the application was delivered to it.
>
> . . .
>
> **40.7** The Board may relieve against the strict application of these Rules where it considers it advisable.

Submissions

16. The union asserts that the clear and express language of section 128.1(3) of the Act requires the employer to provide certain information, including the names of the employees in the bargaining unit, within two days after receiving notice of the application. It says that the Board does not have the discretion to relieve against the express limits set out in section 128.1(3) of the Act. In the alternative, the union argues that the Board should not exercise its discretion in favour of the responding party in this case.

17. In its first position, the applicant asserts that the clear and express language of section 128.1 (3) and (4) of the Act makes the provision mandatory. In *Air Kool Limited*, [2005] OLRB Rep. July/August 525 (Aug. 17, 2005) the Board found the language in section 128.1(3) of the Act to be mandatory and that it could not relieve against the two day time limit. The union says that analysis is correct and should prevail.

18. The union says that the Board accepted and followed the *Air Kool* interpretation until the Divisional Court decision in *Maystar General Contractors Inc. and The International Union of Painters and Allied Trades, Local Union 1819 and The Ontario Labour Relations Board*, [2007] CanLII 8928 (ON S.C.D.C.). In *Maystar*, a case where the filing did not happen on time because of clerical inadvertence, the Divisional Court found the language to be directory. On appeal to the Court of Appeal, the *Maystar* decision was not overturned on the merits. Instead, the issue was found to be moot because the Board had reconsidered its determination after the Divisional Court decision. The Court of Appeal however did comment both on the standard of review and the issue of deference.

19. The applicant contends the Board has not to this point explained how it has the discretion to accept late filed information submitted by the employer as to identity of employees in light of the clear statutory requirement of section 128.1(3) and the analysis in *Air Kool.*

20. The union reiterates the direction of the Court of Appeal in *Maystar* that the Board would again consider whether it has discretion to extend the time for filing of the late filed information. It relies on the decision in *D.D.R. Landscape Contractors Ltd.*, [2008] O.L.R.D. No. 3208 (Aug. 7, 2008).

21. The applicant does not have knowledge upon which it can contest the facts relied upon by the responding party in support of its position.

22. On the exercise of the Board's discretion, the applicant's position is that this is not a case where the Board should do so, if it has the discretion to consider late filed information. That is because the responding party did not provide reasons why the response was late when it filed the late response, nor did it seek an extension of time at that time. The applicant contends further that the application material and the Registrar's confirmation of filing provide complete information and that the responding party was advised in the September 17, 2008 decision that its request for an extension was denied. It submits further that the failings of counsel is not a proper basis for considering a late filed response and that many responding parties complete responses without legal assistance.

23. In terms of the approach the Board should take to the issue of prejudice, the applicant relies on the decision in *D.D.R. Landscape Contractors Ltd., supra,* and its reference therein to *Reids Uptown Homes,* [2007] OLRB Rep. May/June 633 (May 16, 2007). In *D.D.R. Landscape Contractors Ltd., supra,* relied upon by the applicant, the Board dealt with the responding party's submission that since the level of support crystallized on the application filing date there is never prejudice to the union. In *Reids*, the Board held that there is a presumption of prejudice. In this case, the applicant also relies on the addition of names by the responding party.

24. The employer submits that the Board remains bound by the Divisional Court decision in *Maystar* as that decision was neither endorsed nor overturned by the Court of Appeal, but rather the issue was determined to be moot. In the responding party's view, the *obiter* comments of the Court of Appeal regarding the appropriate standard of review do not have the legal effect of overturning that portion of the Divisional Court decision that addressed the interpretation of section 128.1(3).

25. The responding party then asks the Board to exercise its discretion in the manner expressed in *Easton's Group of Hotels Inc.*, [2006] O.L.R.D. No. 2940 (Aug. 9, 2006) and with regard to the criteria described for that exercise in *Carman Construction Inc.*, [2008] OLRB Rep. Jan./Feb. 1 (Jan. 8, 2008). In *Easton's*, referred to by the Court of Appeal in *Maystar*, the Board accepted the late filed information where the employer asserted it was not the employer of the group of affected employees.

26. In this case, the responding party asked for an extension before the deadline for filing in order to seek legal advice from labour counsel. The responding party elaborated its reasons for the delay when requested by the Board. The facts upon which it relies are that the principal of the responding party recognized that he had been served with a legal document and immediately called his lawyer who was not a labour lawyer. His lawyer suggested that they set up a time to have lunch and speak about the document and the principal met with him on the day suggested by the lawyer which was Wednesday September 17, 2008. The principal of the responded party asserts that he trusted his lawyer's judgement and so considered that the matter was being handled in an appropriate fashion.

27. When the two met on Wednesday September 17, 2008, the lawyer reviewed the documents and commented that the 48-hour deadline for response was unreasonable. The principal of the responding party says he was concerned about the deadline and pressed his legal counsel to take action. In response, the lawyer called the Board while the principal was in the office and wrote the letter referred to in paragraph 7 of this decision. The lawyer advised the responding party that he would attempt to secure legal counsel specializing in labour law. The application for certification and posting document was left with the lawyer.

28. Shortly after 5 p.m. on the evening of September 17, 2008, the principal of the responding party received the decision denying the request and advising that the responding party had until midnight that night to respond. The principal of the responding party, "in a panic" realized that his lawyer had all his paperwork and called him. The principal of the responding party then says he did everything he could to comply with the Board's instructions. He sent the required posting to all of the job sites and instructed that it be posted and then filled out the confirmation of posting. He asserts that he did not realize that additional filings were required but even if he had, he did not have the means to prepare a response. He then called his lawyer and on his advice, took no further action until the next day, September 18, 2008 whereupon he retained labour counsel and the response was filed late on the afternoon of that day.

29. The responding party asserts there is no prejudice to the applicant because the response was filed less than 24 hours late, at which time the union learned that the responding party sought to add a related employer and the number of individuals relied upon by the employer. The responding party says that the applicant has asserted no real prejudice in this case and that the presumption of prejudice should not be enough in the face of a reasonable excuse for the delay in filing.

30. Finally the responding party contends that as a matter of public policy and particularly in a card based application, the responding party should not be penalized where no real prejudice has been advanced. It asks the Board to accept the late filed information with the response.

What is the impact of the court decisions in Maystar?

31. The Board in *Maystar* determined that it had no jurisdiction to accept late filed information. Based then only on the information provided by the applicant union, the union was certified. In doing so the Board was following the decision in *Air Kool, supra.* The Divisional Court determined that the Board's decision was subject to review on the standard of "correctness". The Divisional Court then determined that the Board's decision was not correct as the language of section 128.1(3) of the Act was directory, not mandatory. The Board reconsidered its decision, as it was required to do, considered the late filed information, revoked the certificates that had been issued and continued to process the application in the normal course.

32. The union appealed the Divisional Court decision to the Court of Appeal. The Court of Appeal declined to exercise its discretion to decide the appeal on the merits because the Board had by then reconsidered its decision and revoked the certificates. The Court of Appeal decided this rendered the matter moot. However, the Court of Appeal did comment on the Divisional Court's use of the standard of correctness and on the Board's jurisprudence on the substantive issue. On the standard of correctness the Court of Appeal said the following, at paragraph 42:

> 42. I conclude, however, with the following caution. Nothing in these reasons should be taken as affirming the Divisional Court's view that the appropriate standard of review of the Board Decision was correctness and that no deference was owed to the Board in its interpretation of the relevant certification provisions in the *LRA*. The decisions of the Supreme Court of Canada, over the course of many decades, show an unbroken commitment to affording labour relations boards the highest levels of judicial deference on matters within their exclusive jurisdiction. See, for example, *Canadian Union of Public Employees Local 963 v. New Brunswick Liquor Corp.*, 1979 CanLII 23 (S.C.C.), [1979] 2 S.C.R. 227, *Canada (Attorney General) v. Public Service Alliance of Canada*, 1993 CanLII 125 (S.C.C.), [1993] 1 S.C.R. 941 and

> *Royal Oak Mines Inc. v. Canada (Labour Relations Board)*, [1993] 1 S.C.R. 369.[7] Issues which arise in implementing the *LRA* provisions governing the certification process in the construction industry are such matters.

33. On the Board's jurisprudence on the question of its discretion to entertain late filed information, the Court of Appeal said, at paragraph 44:

> 44. Appreciating the need for deference on matters within the Board's exclusive jurisdiction further militates against deciding the present appeal on the merits. A decision on the Procedural Issue would require the court to analyze what appear to be two competing lines of Board authority and to perhaps accept one and reject the other.[8] If nothing else, it would be foolhardy for this court to pre-emptively interpret complicated statutory provisions involving practices and procedures of which the court knows very little, before the Board has an opportunity to consider and, perhaps, reconcile those authorities. To embark on a review of the merits would require this court to do precisely what the jurisprudence indicates is improper – rather than defer to the Board, it would have this court dictate the process the Board is to follow when making decisions on certification, a matter within its exclusive jurisdiction.

34. What we have from the court decisions is an analysis of section 128.1(3) by the Divisional Court, a lack of endorsement by the Court of Appeal that the standard of correctness applies to the review of the Board's decision, and the Court of Appeal's deferral of the interpretation of the section to the Board. Consequently, I cannot agree with the responding party that the Divisional Court's decision in *Maystar* on the interpretation of section 128.1(3) is binding on the Board.

35. This is evident from the Court of Appeal's comments to the Board suggesting that it has the ability to reconcile the competing lines of Board authority and that deference should be accorded to that procedure. If the Court of Appeal considered the Divisional Court decision to be binding on the Board, it would have reflected that the Board's future decision making power would be limited to following the Divisional Court decision.

36. The Board therefore has an opportunity to revisit the decision in *Air Kool.* That consideration involves whether the jurisprudence generated following *Air Kool* should be given primacy over the jurisprudence generated following *Maystar* wherein the Board exercised its discretion. The Board now has the benefit of the substantive analysis of the Divisional Court and its experience in the exercise of discretion in the period between the Court decisions: *Gagnon Demolition Inc.,* [2007] O.L.R.D. No. 1448 April 11, 2007; *Kralik Electrical Services Inc.,* [2007] O.L.R.D. No. 1525 April 13, 2007; *Ceriko Asselin Lombardi Inc.,* [2007] O.L.R.D. No. 2150 (May 16, 2007; *Greenleaf Investments Corp.,* [2007] O.L.R.D. No. 3533 August 27, 2007; *Black and MacDonald Ltd.,* [2007] O.L.R.D. No. 3702 September 11, 2007; *JD Fabricating Ltd.,* [2007] O.L.R.D. No. 4435 October 25, 2007;*Carman Construction Inc.,* [2008] O.L.R.D. No. 111 January 8, 2008; *Lomax Management Inc.,* [2008] O.L.R.D. No. 82 January 9, 2008; *Schickedanz Bros. Ltd.,* Board File No. 0671-08-R dated June 4, 2008 and *Dunpar Homes,* Board File No. 0810-08-R dated June 16 & 17, 2008.

Does the Board have discretion to consider late filed information under section 128.1(3)?

37. The first question concerns the proper interpretation of the timeliness provision of section 128.1(3). Can it reasonably be interpreted differently than the way it was interpreted in *Air Kool*? If

so, the second question concerns labour relations: which interpretation produces the preferable labour relations outcome?

38. On the first question, the decision in *Air Kool* analyses why the provision is mandatory such that the Board has no discretion to consider late filed information under section 128.1(3). An alternative analysis is that contained in the Divisional Court decision. In my view, the reasoning of the Divisional Court is persuasive and provides a proper interpretation of the statutory provision. I refer to the following from the Divisional Court decision:

> [26] With respect, the Board has made two fundamental errors in concluding that the word "shall" in s. 128.1 (3) is mandatory. First, s. 128.1 (4) does not describe the consequences of failing to file information within the two-day time limit. Subsection 128.1 (4) simply directs the Board to determine the union's level of support as of the certification date, and instructs the Board as to the information upon which it is to make that determination. *Subsection 128.1 (4) does not direct the Board to* not *consider late-filed information.* This conclusion is consistent with the highly prescriptive nature of the certification provisions in the LRA as noted by the Board and emphasized by the Union in this application. Given that the Legislature's clear intent is to "closely manage the establishment of bargaining rights by certification", if the Legislature intended the Board to *always* refuse to consider late-filed information, it would have expressly said so.
>
> [27] In addition, contrary to the Board's assertion at para. 9 of its decision, s. 128.1 (4) does not require the Board to certify the union if the employer does not file its information within the two-day time limit. The decision to certify the union without a representation vote is discretionary and requires evidence that more than 55 percent of employees in the proposed bargaining unit support the union (see s. 128.1 (13)).
>
> [28] Second, the Board erred in stating, at para. 9 of its decision, that s. 128.1 (5) sets out the "circumstances in which the Board may consider otherwise untimely information." This provision does not in any way address the timeliness of information placed before the Board. It simply provides the Board with the discretion to consider allegations of unfair labour practices, fraud or misrepresentation when determining the union's level of support at the date of the certification application. As indicated in *Air Kool, supra* at para. 26, s. 128.1 (5) is demonstrative of the Legislature's intent to "closely manage" certification applications by clarifying that the Board has discretion to consider certain evidence (like evidence of fraud). But it does not necessarily follow that this provision demonstrates the Legislature's intent to *prohibit* the Board from considering late-filed information. Again, if the Legislature intended such a consequence, it would have expressly said so.
>
> [29] In my view, the word "shall" in s. 128.1 (3) is directory. If an employer fails to deliver its information within the two-day time limit, the Board *may* remedy the breach in accordance with its Rules of Procedure (see *Easton's Group of Hotels Inc.*, [2006] O.L.R.D. No. 2940 at paras. 11-20).

39. I adopt this analysis. The "shall" that is in subsection (3) is directed at the employer, not the Board. The Legislature has not stated that "the Board shall not consider" information from the employer that is received after the two day period. In addition, it is notable that when the Legislature intends to restrict the Board, as in section 96(8) of the Act, it states that "The Board shall not, under this section, certify a trade union as the bargaining agent of employees in a bargaining unit".

40. The second question concerns the labour relations consequences of the two different approaches, that of *Air Kool* and of the Divisional Court in *Maystar*. For the reasons that follow, I am persuaded that the labour relations considerations favour the latter approach.

41. One advantage of the mandatory approach in *Air Kool* is that it provided certainty in the application of the statutory provisions. The labour relations community understood that responding parties had to provide the names of the individuals the employer said were in the bargaining unit on the application filing date within two days of receiving the certification application.

42. The disadvantages of the mandatory approach are twofold. Firstly, the bright line test it applied can, on occasion, as was evidenced in *Maystar*, have unfair results. While the Board expects prompt, timely responses from employers in certification applications, the first stated purpose of the Act is to facilitate collective bargaining between employers and trade unions that are the *freely-designated representatives of the employees*. An interpretation of section 128.1(3) that ties the Board's hands with respect to late-filed information results in no opportunity to test the employer's assertion that the union does not represent the majority of the employees in the bargaining unit. Interpretations of the Act that are consistent with its purposes must be preferred over those that are inconsistent with it.

43. The range of possible circumstances that might justify the Board considering late filed information cannot be predicted in advance. The Board should not so restrict itself that, in an appropriate case requiring the fair exercise of discretion, it refuses to consider the substantive matter. The Board should hold open the possibility, in an appropriate case, that it may come to the assistance of a responding party where it is equitable and makes labour relations sense to do so. The Board routinely does so in the context of late responses filed in non-construction applications under effectively the same language found in section 7(14) of the Act which reads:

> **7.** (14) If the employer disagrees with the description of the proposed bargaining unit, the employer may give the Board a written description of the bargaining unit that the employer proposes and shall do so within two days (excluding Saturdays, Sundays and holidays) after the day on which the employer receives the application for certification.

44. The second disadvantage of the mandatory approach is that it treats differently the information referred to in section 128.1(3) from the other information a responding party is required to provide in its response under the Board's Rules. Under section 128.1(3)(a), the names of the employees the responding party alleges were at work performing bargaining unit work on the application filing date must be provided. Under the mandatory approach this information alone cannot be admitted by the Board if it is filed late. Other important information in a late filed response falls within the Board's discretion to admit under the power the Board has in Rule 40.7, above. Such information may include the identity of the employer, the number of employees the responding party alleges are in the bargaining unit, and other relevant information to enable the Board to consider the application. Thus, the Board could find itself in the awkward position of being told by the employer, for example, that there were 20 employees in the bargaining unit on the date of application, when the applicant union had provided, say, 5 union membership cards. The Board would not be entitled, under the mandatory approach, to obtain the names of the 20 employees the employer alleged were at work in the bargaining unit on the application filing date, but (assuming the Board admitted the other late filed information in the response) the Board would still have to address the discrepancy between

there being 5 or 20 employees in the bargaining unit for the purposes of determining whether the union was in a position to be certified.

45. The instant case provides another example of this. The Board's September 17, 2008 decision advised the responding party that the two-day time limit to file "certain information" expired at midnight. Under the Rules there is a 5 pm deadline to file the response. This is not a rational or workable result. This results in two deadlines for the information the Board requires from the responding party. Notably, the applicant itself took issue with this in correspondence dated September 19, 2008 and argued that the late filed information had to be filed by 5 pm in accordance with the Board's rules. The capacity of the Board to exercise its discretion with respect to the matters in the response other than as stipulated in section 128.1(3) leads to the conclusion that the Legislature intends the section to be read in a directory fashion with the Board retaining the same discretion to be applied to the response as a whole.

46. The *Maystar* case offers another such example. There the responding party delivered its response to the union within the two day time period, and through inadvertence (or matters entirely beyond its control) failed to file it with the Board in a timely manner. An unjust result occurs if the statute is read in a way that deprives the Board of the jurisdiction to address the merits of the substantive response.

47. In summary, from a labour relations perspective, what makes sense is to treat the response as a whole, and generally not to parse out the information produced under section 128.1(3) as compared to the other information sought by the Board, and provided, in the employer's response. If the response is filed late, i.e. outside of the two days required in the Board's Rules, then discretion should be exercised over all of the information in the response, and not just the information required under section 128.1(3) of the Act.

48. For the reasons described, having considered both Court decisions, the purpose and language of the Act and the policy considerations relevant to the Board, I am of the view that the Board has the discretion to consider the late filed information provided under section 128.1 of the Act.

Should the Board exercise its discretion in this case to admit the late response?

49. The principal of the responding party acted expeditiously and carefully in the circumstances. He immediately contacted counsel in anticipation that his counsel would be able to deal with what was required. At the meeting with his original counsel, through no fault of the responding party, it became apparent that the responding party's counsel was not equipped to deal with the situation. Arrangements were made for the responding party to consult with labour counsel who could deal with the application.

50. The principal of the responding party acted with diligence, trying to comply with the Board's requirements in a situation well beyond his knowledge and capability. Once he appointed counsel capable of dealing with the situation, a response was filed expeditiously. The Board was advised of this intention as was the applicant by the Board's decision of September 17, 2008. In fact, the actions of the responding party by retaining labour counsel and that counsel having acted quickly to file a response, confirms the responding party's genuine intention to act as it said it would.

51. In *Reids, supra,* the Board said that prejudice to the applicant union is always present if the Board were to consider late filed information in a construction certification application, and that the reason for the lateness was the critical consideration. These positions were refined in *Carman, supra,* as follows:

> 25. Although it is of primary significance to the Board, the reason for the delay is not the only factor that will be taken into account by the Board, nor will it be singularly determinative of the request made by the responding party. Other factors are also of considerable significance, such as whether the union contributed to the employer's delay or whether the responding party responded immediately after becoming aware of the situation. In addition, the Board will consider how long beyond the two-day statutory time frame the responding party actually delivered and filed its response. In that regard, the extent to which the applicant is prejudiced by the failure of the responding party to file a timely response is a critical factor that must be weighed by the Board in every case. In *Reids Uptown Homes*, the Board noted that it can be very difficult for a union to ascertain with any degree of certainty the accuracy of the factual basis for the position being taken by an employer as time progresses beyond the initial two-day time period for filing a response to an application for certification. The applicant in this proceeding relies upon the passage at paragraph 32 of *Reids Uptown Homes* for the proposition that the prejudice to a union as a result of a late-filed response will be the same in every case and will always involve prejudice, and the same kind of prejudice.
>
> 26. The prejudice to a union as a result of a late-filed response will depend upon the circumstances of each case. In certain cases, there may be little prejudice, if any, to a union resulting from a short delay in delivering and filing the response - see, for example, both *Maystar* and *Gagnon Demolition Inc.*, cited above, where the union had actual notice of the employer's position. That said, the Board's experience allows it to take administrative notice of the fact that the ability of a union in the construction industry to ascertain accurate information about the factual basis for a responding party's position - particularly when the union is alleged to have underestimated the number of employees in the bargaining unit - diminishes rapidly as time progresses, and that delays of even one or two days may well lessen this ability in a meaningful way.

52. I adopt this approach. In determining whether to exercise my discretion and grant the responding party an extension of time for the filing of its response, I consider it appropriate in the instant matter to consider: the length of the delay; whether the responding party has provided a compelling explanation that justifies the entire length of the delay; and, the prejudice caused by the delay to the applicant. The responding party has provided a detailed explanation for the entire period of the delay that I find to be compelling. The explanation provided indicates that, at all times, it was the responding party's desire and intention to comply with the two day filing requirement. The responding party acted responsibly and with due diligence and expedition throughout. Assuming, without accepting, that there was inadvertence by its original counsel, the responding party sought to have its case determined on the merits. The applicant and the Board knew that it would likely receive a response when the September 17, 2008 decision issued. The period of the delay was short. The Board had yet to consider or act on the application at the time when the response was received.

53. In regard to prejudice to the applicant, the applicant has suggested some prejudice because of the addition of names of employees. It relies also on the presumption of prejudice that the Board identified in *Reids, supra* and *Teston Pipelines Limited,* [2008] O.L.R.D. No. 2165 (May 8, 2008),

which is that prejudice will be present in every case. I accept that the one day delay in this case will have resulted in some margin of prejudice to the applicant. However, in the present case, even if the responding party had filed its response in a timely manner, a period of five days would have passed before the applicant received the response (this period of five days is the result of the application having been filed on a Friday and not delivered to the responding party until the following Monday). The actual prejudice suffered by the applicant was the passage of a further 24 hours beyond the initial five day delay for which the responding party was not responsible. I am not persuaded that the margin of prejudice caused by the responding party's delay is sufficient to warrant not granting the responding party's request for an extension of time.

54. In balancing the right of the responding party to advance a substantive defence and the substantial consequence of being certified by default, and the reasons for the late filing as against any minimal prejudice and a presumption of prejudice, I am persuaded that the appropriate and fair response is to allow for the late filed response inclusive of the late filed information.

55. The Registrar has certified that the applicant has been found to be a trade union in an earlier proceeding under the Act and an official of the applicant with knowledge of its affairs has declared the applicant is a trade union that according to established trade union practice pertains to the construction industry. Therefore, having regard to section 113 of the Act, the Registrar's certificate and the applicant's declaration, the Board finds that the applicant is a trade union within the meaning of sections 1(1) and 126(1) of the Act.

56. The Board further finds that this application does not relate to the industrial, commercial and institutional sector of the construction industry referred to in section 126 of the Act.

57. The Board further finds that all construction labourers in the employ of the responding party in the County of Peterborough (except for the geographic Township of Cavan), the County of Victoria (except for the geographic Township of Manvers) and the provisional County of Haliburton and the County of Simcoe and the District Municipality of Muskoka, in all sectors of the construction industry other than the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the responding party appropriate for collective bargaining.

58. On the basis of only the information provided in the application (including the information and membership evidence filed by the applicant) and the information provided under subsection 128.1(3) of the Act, the Board is not able to determine the percentage of employees in the bargaining unit who were members of the applicant as of the date the application was filed. The Board will determine that following a Regional Certification Meeting. Representations with respect to any status disputes must be made in accordance with the directions provided in Parts II, III and IV in Information Bulletin No. 9: Status Disputes in Certification Applications in the Construction Industry.

59. This matter is referred to the Manager of Field Services to conduct a Regional Certification Meeting.

1507-08-U; 2743-08-M Operative Plasterers' and Cement Masons' International Union of the United States and Canada, Local 598, Applicant v. **Cornerstone Structural Restoration Inc.**, Responding Party

Discharge – Interim Relief – Remedies – Unfair Labour Practice – The union sought interim reinstatement of two working foremen and two labourers – The employer claimed that the individuals were disciplined because the project was progressing too slowly and that they were laid-off because there was a lack of work – The Board first determined whether there was a causal relationship between the layoffs and the exercise of a right under the Act – The Board found no appearance of a causal connection between the layoffs of the two short service labourers and the exercise of a right, because almost half the workforce had been laid off during the relevant time and it was reasonable that the two labourers would have been laid off – The Board did find an appearance of a causal relationship between the layoffs of the two working foremen and their support for the union based on: the timing of the company's conduct; the company's inconsistent conduct with prior practices; the frequency of such conduct with prior practice and the unreasonableness of it when viewed in context – Concerning irreparable harm, the Board found it was reasonable to infer that laying-off the two working foremen would make employees afraid to testify in the upcoming hearing regarding who was in the bargaining unit – Finally, the Board held that the balance of harm to the union was considerable since the lay-offs undermined the Union's campaign at the very time it needed to call evidence before the Board – Interim order granted

BEFORE: *D. L. Gee*, Alternate Chair.

APPEARANCES: *Mike McCreary, Michael Mazucca, Harold St. Croix* and *Tony Mollica* for the applicant; *David L. W. Francis, J. Zoellner, G. Churchill, S. Roga* and *G. Ropp* for the responding party.

DECISION OF THE BOARD; December 19, 2008

1. Board File No. 1507-08-U is an application pursuant to section 96 of the *Labour Relations Act, 1995* (the "Act") filed with the Board on August 13, 2008. Board File No. 2743-08-M is an application for interim relief pursuant to section 98 of the Act filed with the Board on December 3, 2008. In the application for interim relief, the Operative Plasterers' and Cement Masons' International Union of the United States and Canada, Local 598 (referred to herein as the "Union") seeks the reinstatement of Gord Balicki, Don Haggith, Matt Amor and Charles Beckham to their employment with Cornerstone Structural Restoration Inc. ("Cornerstone" or the "Company"). Cornerstone resists the application. It states that Balicki, Haggith, Amor and Beckham were laid off due to a lack of work and without anti-union animus.

The Consultation Process

2. A consultation was held on December 16, 2008 in connection with the interim relief application. In accordance with the Board's Rules of Procedure, the parties had filed declarations and submissions in relation to the application for interim relief in advance of the consultation. The Union filed declarations from each of the individuals whose reinstatement was being sought as well as Harold St. Croix, the Union Business Agent. Cornerstone filed declarations from: John Thompson, manager of the owner of the building on Spears Road at which the four individuals in issue were

working at the time of their layoff; Steve Roga, owner of Cornerstone; Jodi Zoellner, Operations Manager and partial owner of Cornerstone; Greg Ropp, estimator and project manager with Cornerstone; Richard Power, a foreman with Cornerstone; and Richard Bestward, a lead hand and skilled worker with Cornerstone.

3. At the commencement of the consultation, the Board indicated to the parties that, based on the declarations and submissions filed, the Board did not need to hear from the parties on any issues other than those that arise out of paragraph 3 of subsection 98(2) and subsection 98(3). The Board desired clarification in a few areas and felt that the most expeditious way of obtaining such clarification was for the Board to direct its questions to counsel for each of the parties and have them get the answers from their clients. Following receipt of the information requested, the Board indicated that it did not need to question any of the deponents. However, the parties were permitted, if they wished to do so, to have a deponent orally convey to the Board the information that the Board had requested and obtained through counsel. The Union called Haggith and St. Croix. I and counsel for Cornerstone asked questions of both Haggith and St. Croix. Cornerstone did not wish to call anyone. As a result of the information conveyed to the Board by Haggith and St. Croix, I, however, indicated that I wished to ask questions of a member of Cornerstone management. As a result, Zoellner was questioned by me followed by counsel for the parties. The parties were then permitted 30 minutes each to make their submissions to the Board, with the Union being given a further 10 minutes for reply.

Introductory Overview

4. By way of overview, Messrs. Balicki, Haggith, Amor and Beckham were working together as a crew on a Cornerstone project located on Spears Road when they were informed on or about November 25, 2008 that they were no longer required. Messrs. Balicki, Haggith, Amor and Beckham are referred to herein collectively as the "Spears Crew". Balicki and Haggith are both working foremen with at least 5 and 12 years of service respectively. Amor and Beckham are labourers with 1.5 and approximately .5 years of service respectively. The Union argues that the members of the Spears Crew were individually and collectively subjected to unprecedented scrutiny, discipline, surveillance and finally termination by the Company following the filing of two certification applications due to their support for the Union. The Company argues that the members of the Spears Crew had allowed the Spears Road job to fall behind schedule and were laid off due to the fact that the owner of the property asked the work to be shut down until spring when the weather improved. The Company argues that, of its total complement of about 40 employees, it has laid off 18 of them since November 17 due to the weather and a shortage of work. The Union replies that the Company has laid of employees in previous years due to the weather and a shortage of work but has kept the working foremen and lead hands working in order to retain their most skilled and valuable employees. The Union argues that the fact that the Company elected to layoff Haggith and Balicki, both working foremen of relatively long service, while it kept other less experienced workers employed, gives the appearance that their layoff was motivated by anti-union considerations.

The Relevant Provisions of the Act

5. The following provisions of the Act are relevant to the interim relief application:

> **98.** (1) On application in a pending proceeding, the Board may,
>
> . . .

> > (b) subject to subsections (2) and (3), make interim orders requiring an employer to reinstate an employee in employment on such terms as it considers appropriate;
> >
> > ....
>
> (2) The Board may exercise its power under clause (1) (b) or (c) only if the Board determines that all of the following conditions are met:
>
> > 1. The circumstances giving rise to the pending proceeding occurred at a time when a campaign to establish bargaining rights was underway.
> >
> > 2. There is a serious issue to be decided in the pending proceeding.
> >
> > 3. The interim relief is necessary to prevent irreparable harm or is necessary to achieve other significant labour relations objectives.
> >
> > 4. The balance of harm favours the granting of the interim relief pending a decision on the merits in the pending proceeding.
>
> (3) The Board shall not exercise its powers under clause (1) (b) or (c) if it appears to the Board that the alteration of terms and conditions, dismissal, reprisal, penalty or discipline by the employer was unrelated to the exercise of rights under the Act by an employee.
>
> (4) Despite subsection 96 (5), in an application under this section, the burden of proof lies on the applicant.

The Issues

6. In order for the application to succeed, the four conditions identified in subsection 98(2) must exist and that the Board can only exercise its discretion to direct the reinstatement of the four individuals if it appears to the Board that there is a casual relationship between the layoffs and the exercise of rights under the Act.

7. Cornerstone does not dispute that the preconditions to the Board making an interim order as set out in section 98(2) paragraphs 1 and 2 exist. The circumstances giving rise to the pending proceeding occurred at a time when a campaign to establish bargaining rights was underway and there is a serious issue to be tried in a pending proceeding.

8. I am required to determine if the conditions set out in paragraphs 3 and 4 of subsection 98(2) exist and whether there is an appearance that the layoff of the members of the Spears Crew was causally related to their support for the Union.

Information Provided by the Parties

9. I have attempted herein to summarize the considerable information provided by the parties, highlighting where there is a dispute.

10. The relevant information begins with the filing of two certification applications. On July 17 and 18, 2008, the Union applied to the Board pursuant to section 128.1 of the Act to be certified to represent all cement masons and cement mason apprentices and masonry restoration employees,

including steeplejack journeymen and apprentices and apprentices groundmen and waterproofers in the employ of Cornerstone Structural Restoration Inc. The certification application filed on July 17, 2008 seeks bargaining rights in all of the non-ICI sectors of the construction industry in Board Area 8. The certification application filed on July 18, 2008 seeks bargaining rights in the ICI sector province-wide and in all non-ICI sectors in Board Area 6.

11. By way of decision dated July 25, 2008, the Board informed the parties that it was unable to determine from the information filed with the application and the information provided by the responding party the percentage of employees in the bargaining unit who were members of the applicant as of the date of application. The matters were referred to a Regional Certification meeting.

12. At the Regional Certification meetings, each party identified who it believed was at work in the bargaining unit on the date of application. In both files there is a considerable discrepancy between the parties. The July 18th certification application has been scheduled for hearing commencing on January 14, 2009. At the hearing, employees of Cornerstone will be called by either the Union or Cornerstone to testify as to whether they were performing bargaining unit work on the date of application. If, as a result of the evidence heard at the hearing, the Board determines that the Union had more than 55% membership support on the date of application, the Union would be certified. If the Board determines that the Union had between 40 and 55% membership support a vote may be directed. If it is determined that the Union had less than 40% support, the application would be dismissed.

13. As indicated above, the Union filed an application pursuant to section 96 of the Act on August 13, 2008 (referred to herein as the "unfair labour practice complaint"). As initially filed, the unfair labour practice complaint alleged that Cornerstone had violated sections 70, 72, 76 and 86(2) of the Act by having distributed a four page letter to its employees and telling Haggith and other employees that there would not be anymore weekend work until the certification application was resolved.

14. It is not disputed that the letter in question was distributed on July 30, 2008. It begins as follows:

> You may have been approached already, or may be approached in the future by someone asking you to sign a union card. Signing a union card is a very important decision for both you and the Company. In this regard we feel it is important that you are fully informed and prepared so we have compiled the following information:

15. The information that follows consists of 12 points designed to cause an employee to pause and question whether they want union representation. The letter is signed by the President of Cornerstone. The contents of the letter convey not only the factual information set out therein but also the message that Cornerstone does not want a Union.

16. The declaration filed by Steve Roga, General Manager of Cornerstone, acknowledges that Haggith was told "on numerous occasions" not to work on Saturdays as it was not economical or efficient for the Company to pay him to drive to the job site to make up a few hours of work. Haggith was to work extra hours during the week if he needed to make hours. The response to the unfair labour practice complaint states that such discussion took place on July 30, 2008.

17. The unfair labour practice complaint has been amended a number of times since it was filed to now include the following additional allegations:

September 10, 2008 Amendments

- Attendance by Zoellner on September 3, 2008 at the Spears Road site at which time he attempted to "pick a fight" with Balicki advancing complaints of poor workmanship and work taking too long to complete. Balicki has worked for Cornerstone for 14 years and never before had such complaints or received any discipline.
- Attendance that same day by Zoellner at the Spencer Avenue site who complained to Haggith about poor workmanship and work taking too long to complete. Haggith has worked for Cornerstone for 12 years and has never had any complaints of poor workmanship or received any discipline.
- Zoellner then switched Balicki to the Spencer site and Haggith to the Spears site.

September 15, 2008 Amendments

- Attendance by Zoellner on September 10, 2008 at the Spears site at which time he:

    - Questioned Haggith about leaving early the previous day and told him that the company was aware of his every move because of a GPS device on the company's vehicle.
    - Questioned Mr. Young about missing work without informing the Company and asked him to sign a disciplinary statement. When Mr. Young asked if he could speak to a union representative, Mr. Zoellner responded by saying "that is just a rumour there is no union here."
    - Approached Mr. Malcolm and asked him if he had signed a Union Card then said "I sure hope you didn't sign a Union Card." Zoellner then questioned Malcolm about his absence the previous week demanding to know why Malcolm was in the hospital and what his condition was.

- It is generally alleged that Zoellner engaged in inappropriate and aggressive behaviour towards perceived Union supporters while the others (non-supporters) are left alone.

November 12, 2008 Amendments

- Haggith is required to complete daily progress reports detailing the work performed every two hours when no other working foremen are required to do so.
- Cornerstone called a safety meeting for all employees on November 5, 2008 at the end of the working day. The meeting was called with little advance notice. The calling of the safety meeting meant that a meeting of the employees that was to have taken place at Haggith's home to discuss the Union had to be cancelled. The Company spoke about safety and then about the Union. A letter about the Union's certification was distributed to the employees. Haggith, Balicki, Beckham and Amor are each named in the November 12, 2008 amendments as having felt they had been physically segregated from other employees at the meeting and felt intimidated by Zoellner.
- Zoellner calls Haggith every Friday to remind him that there will be no more work for him on Saturdays when other workers are allowed to work Saturdays to make up for lost time.

- Balicki was demoted and required to report to Haggith while other more junior employees are working sites Balicki used to work at.

18. On November 18, 2008 the Union wrote to the Board and asked that the application be listed for hearing as:

> Cornerstone is building a case to fire the workers it perceives supported the Applicant in the Applicant's certification application in OLRB File No. 1229-08-R. This transparent attempt to take retribution on perceived union supporters is causing great concern among the workers who have continued to work for Cornerstone since the Application for Certification was filed.

November 18, 2008 Amendments:

- On Friday November 14, 2008 Haggith, Balicki, Beckman and Amor were called into a disciplinary meeting at Cornerstone Head office. The complaints related to workmanship and the speed of work completion.
- Amor, Haggith and Balicki were given a disciplinary letter for Amor having worn shorts to the November 5 meeting at the office.
- Haggith and Balicki are long service employees and had never previously been disciplined.

December 3, 2008 Amendments (as detailed in the interim relief application itself):

- In mid-November 2008, Cornerstone hired a private investigator to spy on the Spears Crew.
- On November 25, 2008 Haggith was informed by Zoellner that the Spears crew was laid off. Haggith was told that there was no work available. The work at Spears Road is not yet completed. Other employees junior to members of the Spears Crew and with less experience are still working.

19. The Union has provided information to the effect that, in past years, Cornerstone has held an annual "profit sharing meeting". At such meetings, management of Cornerstone has stated that, when layoffs occur, the labourers and skilled workers are laid off before the lead hands and working foremen. The Company would attempt to keep the working foremen and lead hands working through the winter. Haggith surmised that the Company adopted this approach in order to ensure that it was able to maintain its more experienced and skilled workers and not lose them to another Company. The Union has provided information, through questions put to Haggith and the declarations filed, that the Company's practice in the past has been to layoff the labourers and skilled workers first. The information provided is that there have been layoffs in past years, including the winter of 2007-2008 at which time there were 10 layoffs, but Haggith and Balicki have not been laid off for at least, and possibly more than, the past five years.

20. The Union, through St. Croix, provided information that two employees of Cornerstone, Messrs. Malcolm and Shellard, had been in regular contact with St. Croix up until the middle of November. These two employees had conveyed to St. Croix that they and other employees of Cornerstone believed that the Company was targeting the Spears Crew because they were union supporters. The other employees did not want to be associated with the members of the Spears Crew lest the employer take retributive action against them as well. Malcolm and Shellard made it clear

that they did not want to be seen with St. Croix as they were concerned that their employment would be negatively impacted if they were perceived by the Company to be union supporters.

21. Cornerstone disputes most of the allegations set out in the unfair labour practice complaint. Cornerstone does not dispute:

- Cornerstone employees were given the July 30, 2008 letter referred to above.
- Haggith was told by Roga on the same day the letter was handed out not to work Saturdays. Cornerstone says that Haggith was told not to work weekends because the small amount of work remaining at the Spears site made paying him to work on weekends, with the travel time involved, uneconomical. Information filed by Cornerstone with the Board with its August 27, 2008 response to the unfair labour practice complaint indicates that Haggith had worked 10 of the previous 25 weekends.
- Although there had been previous issues with both Haggith and Balicki concerning the pace of a project they were on, neither had previously received formal discipline "as any issue was always addressed at the time the particular issue or problem was occurring through open dialogue."
- Haggith and Balicki were switched between the Spencer and Spears sites with Balicki later transferred back to the Spears site.
- Haggith was required to produce daily progress reports.
- Cornerstone held a safety meeting on November 5, 2008 at which the Union was discussed and employees given a letter concerning the Union.
- Cornerstone disciplined the members of the Spears Crew on November 14 for issues relating to workmanship and speed of work completion.
- Cornerstone disciplined Amor, Haggith and Balicki on November 14 for Amor wearing shorts to work.
- Cornerstone hired a private investigator to conduct surveillance on the Spears Road job site for seven days.
- The members of the Spears Crew were laid off on November 25, 2008.
- Cornerstone has work ongoing that Haggith and Balicki are qualified to do.

22. Cornerstone has provided information that Zoellner attended at the Spears job site on September 3, 2008 to inform Balicki that the job was significantly behind schedule. Cornerstone had received complaints concerning the progress of the job from the owner of the Spears Road building. Cornerstone says that it is "not uncommon if a particular job is delayed for Zoellner to speak to the foreman who is responsible for running the job."

23. Cornerstone has provided information that Zoellner attended at the Spencer job site on September 3, 2008 to check up on the progress of work and speak to Haggith. Again, the client was not happy with the progress of the job and had complained.

24. Cornerstone indicates that Balicki and Haggith were switched to one another's job sites as both had suggested that the work was not progressing as scheduled due to the inexperience of their crews. It is explained by Cornerstone that "having worked with both Balicki and Haggith for several years, it was assumed that each would have a new in-sight and perspective and suggestion to resolve these on-going issues" if sent to the other's job site.

25. It is stated that Haggith was asked to complete the daily progress reports in order to track the progress of the work on the Spears site because it was the only project that was noticeably behind schedule.

26. Cornerstone indicates that the November 5, 2008 safety meeting was conducted in the parking lot where people could stand wherever they chose and that the members of the Spears Crew were not segregated from the other employees. Cornerstone denies that Balicki was demoted to work under Haggith and explains that he continues to have all the benefits of the foreman's position. It is explained that Balicki was assigned to work with Haggith to complete the Spears Road project as efficiently as possible "and there is no need for two Company vehicles to be taken to the jobsite as all crewmembers were out of Brantford."

27. The Company states that the members of the Spears Crew have been deliberately delaying the job and are using the unfair labour practice complaint as a shield in order to be disruptive on the job site. The information provided by the Company is that Haggith believes he does not have to work hard because he is a member of the Union and that he discouraged others from working hard.

28. The Company indicates that it hired a private investigator to perform surveillance on the Spears crew as a result of comments made by the client and other workers that these four were deliberately delaying the work at the site. The Company also monitored the GPS devise in the Company vehicles. The investigator concluded that the four men were taking extended breaks and sitting in the Company vehicle for extended periods of time after the start and before the end of each work day. Although the Company felt it had justification for terminating the employment of the four employees, it did not do so.

29. Cornerstone agrees a disciplinary meeting took place on November 14, 2008 but denies that the quality of work performed by the Spears Crew was discussed. Rather, Cornerstone says the progress schedule of the job was discussed with Haggith being questioned as to why even Haggith's own schedule was not being met. Cornerstone says it had several complaints from the owner and tenants and reports that the crew was not working efficiently. The Spears Crew was spoken to about taking extended breaks and lunches and sitting the company vehicle for additional times prior to work and prior to leaving the site. Cornerstone asserts that the employees were submitting time sheets indicating that they had worked a full day when they had not performed such work. The members of the Spears Crew were advised of the Company's concerns and told that, if the practice continued, it would be grounds for termination. During this same meeting, Amor was spoken to concerning the fact that he had worn shorts on November 5, 2008. He was told that wearing shorts to the site and to the shop is a violation of the Company's safety policies. The Company states that as foremen, Haggith and Balicki, and as the health and safety representative, Amor, should be aware of the need to work safely and within the Company's policies. All three were given a written notice.

30. The Company's information is that it laid off two people on November 17, 2008. The Spears Crew, and two other employees not associated with the Spears Crew, were laid off on November 25, 2008. The Spears Crew was laid off due to bad weather and the owner of the building asking that work be suspended until the spring when the weather improves. The material that Cornerstone was using at this project could not be applied when the weather was cold or moist. The Company states that there are one or two weeks of work remaining to be performed at the Spears site.

31. There have been a further nine layoffs since the layoff of the Spears Crew caused by the weather and a work shortage. The Company states that it selects those to be laid off based on what project is shutting down and the skills of the workers. Haggith and Balicki are the two least experienced foremen at Cornerstone.

32. I have not set information provided by Cornerstone in response to the Union's allegations that concern individuals other than the members of the Spears Crew.

Decision

33. As indicated above, the issues I must determine are: (1) whether the conditions set out in paragraphs 3 and 4 of subsection 98(2) exist; and (2) whether there is an appearance that the layoff of the members of the Spears Crew was causally related to their support for the Union. I will begin with the latter question.

34. It is my determination that there is an appearance of a causal relationship between the layoff of Haggith and Balicki and their support for the Union. I come to this conclusion based on: the timing of the Company's conduct; the appearance that, in a number of respects, the Company's conduct following the filing of the certification applications was not consistent with its prior practices; the number of instances within a relatively short period of time where the Company's conduct in relation to Haggith and Balicki appears not to be consistent with its prior practices; and the appearance of a number of instances where Company's conduct in relation to Haggith and Balicki does not seem reasonable or measured when viewed in the context of the issues it asserts it was addressing. In this respect, I find the following information instructive:

- Cornerstone employees were given the July 30, 2008 letter referred to above. On the same day the letter is handed out, Haggith was told by Roga not to work Saturdays.
- Although there had been previous issues with both Haggith and Balicki concerning the pace of a project, neither had previously been disciplined "as any issue was always addressed at the time the particular issue or problem was occurring through open dialogue."
- Haggith and Balicki were switched between the Spencer and Spears sites with Balicki later transferred back to the Spears site. The Company's explanation (as set out in paragraph 24 above) for the initial switch between Haggith and Balicki does not seem reasonable.
- Haggith was required to produce bi-hourly progress reports. Notwithstanding that the Company refers to past instances where work on a job site has fallen behind schedule, the Company gives no information of any other working foreman having been required to produce bi-hourly progress reports.
- With little advance notice, Cornerstone held a safety meeting on November 5, 2008 at which the Union was discussed and employees given a letter concerning the Union. This meeting caused the cancellation of a meeting Haggith had scheduled at his home with other employees to discuss the Union. The information provided suggests that the lack of advance notice of the safety meeting was not consistent with the Company's past practice.
- Cornerstone hired a private investigator to conduct surveillance on the Spears Road job site for seven days in response to complaints that the Spears Crew was not working diligently and causing the work to fall behind schedule. The hiring of a private investigator to conduct surveillance of the job site for a period of seven days does not appear to be a measured response to the Company's concerns.

- Cornerstone formally disciplined Haggith and Balicki on November 14 for issues relating to workmanship and speed of work completion contrary to its prior practice of dealing with problems through open dialogue.
- Cornerstone formally disciplined Amor, Haggith and Balicki on November 14 for Amor wearing shorts to work. The Company disciplined both Haggith and Balicki on the basis that they were both responsible as foremen. Assuming without finding that it is reasonable to hold a foreman responsible when a member of the crew wears shorts to work, it does not seem reasonable for the Company to have held *both* Haggith and Balicki responsible.
- The members of the Spears Crew were laid off on November 25, 2008 when there was only one or two weeks' worth of work remaining.
- Haggith and Balicki were laid off ahead of labourers and skilled workers contrary to the approach the Company had taken in prior years. Haggith and Balicki have not been affected by the seasonal layoffs for at least the past five years.
- Cornerstone has work ongoing that Haggith and Balicki are qualified to do.

35. I am not satisfied, however, that there is an appearance that the layoffs of Amor and Beckham were related to their support for the Union. As indicated above, Amor and Beckham are short service labourers (1.5 and .5 years service respectively). The information suggests that, in the past, the Company has laid off the labourers and skilled workers first. The Company laid off approximately 18 of its 40 employees between November 17 and December 16 and hence it is reasonable that Amor and Beckham would have been laid off due to a lack of work. Further, there is not the same conduct by the Company in relation to Amor and Beckham as there is with Haggith and Balicki. There is one incident of Amor having been formally disciplined for having worn shorts to work and no incidents involving Beckham.

36. I turn then to a consideration of whether the preconditions set out in paragraphs 3 and 4 of subsection 98(2) have been met in respect of Haggith and Balicki.

37. Paragraph 3 requires that the interim relief is necessary to prevent irreparable harm or to achieve other significant labour relations objectives. I have little difficulty finding this condition to be met.

38. The information provided by the Union is that two employees, Malcolm and Shellard, and possibly others, perceived the Company's treatment of Haggith and Balicki prior to their layoffs to be motivated by anti-union animus. Based on this information, as well as relying on the Board's expertise in this area, it is reasonable to infer that Cornerstone employees will perceive that Haggith and Balicki were laid off due to their support for the Union and fear that, if they were to testify at the upcoming hearing in a manner that did not favour the Company, their jobs may too be in jeopardy.

39. The hearing of the employee status issues is scheduled to begin in January 2009. It will be necessary for many employees, including possibly Haggith and Balicki themselves, to testify at this hearing. If the employees perceive that their future employment prospects with the Company depends upon them giving testimony favourable to the Company, the Union's ability to garner evidence favourable to its case will be undermined as will the Board's ability to reach a correct determination of the issues in dispute. An interim order is necessary in prevent the Union's ability to garner evidence and the Board's ability to reach a proper determination from being undermined.

40. I turn then to the last condition: whether the balance of harm favours the granting of the interim relief pending a decision on the merits in the pending proceeding. The Company argues that the balance of harm does not favour the granting of the interim relief as, if Haggith and Balicki are reinstated, someone else will have to be laid off. The Company also points to the information provided that Haggith and Balicki were not working hard and were telling others that they did not have to work hard because they were Union supporters. The Company argues that, if Haggith and Balicki are reinstated, a message will be sent that union supporters cannot be held to any standard of work.

41. The difficulty with the Company's position is that Haggith and Balicki were not terminated for their poor performance. The Company had disciplined them for performance related issues but had not gone so far as to terminate their employment as a result of such issues. Further, the Company does not assert that Haggith and Balicki were selected for lay off due to their performance issues. The Company states that they were laid off purely due to a lack of work. If Haggith and Balicki were not terminated or laid off for performance issues, but rather were laid off purely due to a lack of work, it does not follow that their return to work will send the message that union supporters cannot be held to any standard of work.

42. The balance of harm to the Union if Haggith and Balicki are not returned to work is considerable. As discussed above, the information provided to the Board is that employees of Cornerstone perceive Haggith and Balicki to have been targeted by the Company because they are Union supporters. If Haggith and Balicki are not returned to work on an interim basis, the Union's campaign will be frustrated and undermined at the very time that it needs to be in a position to call evidence before the Board. Unless the interim relief sought is granted with respect to Haggith and Balicki, the Union will not be able to call employees to testify at the status dispute hearings and rely on them to testify truthfully and without fear of employer retribution.

43. As a result, I find that the balance of harm favours the granting of the interim relief in so far as it relates to Haggith and Balicki.

Interim Relief Order

44. For the reasons set out above, I hereby direct Cornerstone Structural Restoration Inc. to immediately:

(i) recall Haggith and Balicki to work on the same terms and conditions as they enjoyed immediately prior to their layoff on November 25, 2008; and

(ii) separately post a copy of this decision and a copy of the attached Notice to Employees for a period of not less than 30 days in a location where the employees are likely to see them.

45. Board File No. 1507-08-U is hereby referred to the Registrar to be scheduled for hearing.

Appendix "A"

The Labour Relations Act, 1995

NOTICE TO EMPLOYEES

Posted by order of the Ontario Labour Relations Board

We have posted this notice in compliance with a direction of the Board, issued after a consultation in which both the company and the union had the opportunity to make submissions.

The Board has ordered Cornerstone Structural Restoration Inc. to recall Gord Balicki and Don Haggith ON AN INTERIM BASIS until the Board considers the reason for their layoff. A hearing before the Board will be scheduled soon. The purpose of that hearing is to determine why Gord Balicki and Don Haggith were laid off.

If the Board ultimately determines that Gord Balicki and Don Haggith were laid off for reasons that had nothing to do with their support for the Union, the temporary recall order will be revoked.

If the Board ultimately finds that their layoff occurred because they were union supporters, exercising their rights under the *Labour Relations Act*, the Board may confirm their recall, and direct that they be compensated for all earnings and benefits lost as a result of their layoff.

> Employees in Ontario have these rights which are protected by law:
>
> An employee has the right to join a trade union of his or her own choice and to participate in its lawful activities.
>
> An employee has the right to oppose a trade union, or subject to the union security clause in the collective agreement with his or her employer, refuse to join a trade union.
>
> An employee has the right to cast a secret ballot in favour of, or in opposition to, a trade union if the Ontario Labour Relations Board directs a representation vote.
>
> An employee has the right not to be discriminated against or penalized by an employer or by a trade union because he or she is exercising rights under the *Labour Relations Act, 1995*, as amended.
>
> An employee has the right not to be penalized because he or she participated in a proceeding under the *Labour Relations Act, 1995*, as amended.
>
> An employee has the right to remain neutral, to refuse to sign documents opposing the union or to refuse to sign a union membership card.
>
> It is unlawful for employees to be fired or in any way penalized for the exercise of these rights. If this happens, a complaint may be filled with the Ontario Labour Relations Board.

It is unlawful for anyone to use intimidation to compel someone else to become or refrain from becoming a member of a trade union, or to compel someone to refrain from exercising rights under the *Labour Relations Act, 1995*, as amended.

This is an official notice of the Board and must not be removed or defaced.

This notice must remain posted for 30 consecutive days.

DATED this 19th day of December, 2008.

0618-08-ES John Daniels, Applicant v. **Dr. Michael Blackmore** and Director of Employment Standards, Responding Parties

Employment Standards – The Board found that a six-year employee with a regular work week of thirty-five hours who had his hours reduced to eight per week, with the concomitant diminution in pay, was constructively dismissed – There was no implied term or condition in his employment relationship that suggested or anticipated such a dramatic cut, and this was not a lay-off – The employee's subsequent resignation was found to be a reasonable response initiated within a reasonable time of the implemented changes, in accordance with s. 56(1)(c) of the Act – Application granted

BEFORE: *Corinne F. Murray*, Vice-Chair.

APPEARANCES: *Linda Galessiere* and *John Daniels* appeared on behalf of the applicant; *Lyn Coleman* appeared for Dr. Michael Blackmore; no one appeared for the Director of Employment Standards.

DECISION OF THE BOARD; November 20, 2008

1. This is an application for review pursuant to subsection 116(3) of the *Employment Standards Act, 2000,* S.O. 2000, 41, as amended (the "Act") of the refusal of an Employment Standards Officer ("ESO") to issue an order under section 103 of the Act for termination pay. John Daniels ("Daniels") claims a reduction of his hours of work constituted constructive dismissal warranting his notice of his resignation, effective two weeks later on March 30, 2007. The determination of the ESO was that he had been laid off temporarily.

2. Dr. Michael Blackmore ("Blackmore") denies that this reduction constituted constructive dismissal and asserts that Daniels' decision to resign as a full answer to his claim for termination pay of six weeks.

3. Daniels was employed as sole receptionist for Blackmore, a rheumatologist, for approximately six years prior to his resignation. He was paid for the hours he worked and statutory holidays. His work hours were generally 35 hours per week, although there could be minor fluctuations. He submitted time sheets every two weeks on Friday and he was paid on the following Monday for the preceding two week pay period ending Sunday. Blackmore did his payroll from his home and on occasion Daniels would communicate his hours to Blackmore over the phone on Friday and submit the paperwork on Monday at the same time as he received his cheque.

4. In January of 2007, the regularity of Blackmore's presence in the office began to vary due to his personal circumstances. Daniels would cancel the patients' appointments for the days that Dr. Blackmore did not hold office hours. Daniels' hours of work did not change in any material way during this time. At the end of January, Daniels took a vacation period off and when he returned to the office he picked up a message on the office message machine from Blackmore instructing Daniels to call Blackmore at home. When Daniels did so, Blackmore told Daniels that his hours of work were reduced to eight hours per week. There was no specification of when those hours were to be performed nor was Daniels given any indication about how long these reduced hours would continue. Daniels was shocked and did not press Blackmore on any of these details. He continued to work that

day for approximately 5 1/2 hours to clear up the mail etc. that had accumulated. He was not planning to go to work the next day because of what he had been told.

5. The next day Blackmore's parents called him at home. They told Daniels that they would top up the pay Daniels received from their son if he would agree to continue to work his usual hours. They did not want their son to know about this proposal and asked Daniels to submit his hours to Blackmore as if he had reduced his hours in accordance with the directions given by their son.

6. Daniels agreed to this and consequently received a cheque from Blackmore's parents that paid him in advance for the month of February. Time sheets for the weeks ending February 4, 2007 and February 11, 2007 show 8.25 hours and 8 hours respectively. At the end of February, Daniels asked Blackmore what the future held with respect to his reduced pay and hours of work. Blackmore indicated he was unable to predict when Daniels' hours of work would return to normal. Daniels did not press him for more hours but also did not indicate that he accepted this arrangement either.

7. Daniels had no further contact with Blackmore's parents. He cut back his work hours to what he knew he would be paid for, i.e., eight hours. He submitted his letter of resignation on March 12th, effective March 30, 2007. There is no dispute that he was paid for the hours he worked.

Decision

8. The issue raised by these facts is whether the change in Daniels' hours constitutes constructive dismissal justifying his resignation within four weeks of such change and entitling him to termination pay of six weeks salary based upon his regular schedule of work. Subsection 56(1) of the Act provides as follows:

> **56.** (1) An employer terminates the employment of an employee for purposes of section 54 if,
>
> (a) the employer dismisses the employee or otherwise refuses or is unable to continue employing him or her;
>
> (b) the employer constructively dismisses the employee and the employee resigns from his or her employment in response to that within a reasonable period; or
>
> (c) the employer lays the employee off for a period longer than the period of a temporary lay-off. 2000, c. 41, s. 56 (1).

9. Constructive dismissal is undefined in the Act, however, the Board and adjudicators interpreting the Act have given that term the same meaning as given it in civil proceedings. For example, in *Garbo Group Inc.*, [2003] O.E.S.A.D. No. 1360 (Dec. 16, 2003) the Board stated at paragraph 14:

> 14. What constitutes **constructive dismissal** has been the subject matter of many court and tribunal decisions. In *Farber* v. *Royal Trust Co.*, [1977] 1 S.C.R. 846, at page 864, Gonthier, J wrote:

> Thus, it has been established in a number of Canadian common law decisions that where an employer unilaterally makes a fundamental or substantial change to an employee's contract of employment - a change that violates the contract's terms - the employer is committing a fundamental breach of the contract that results in its termination and entitles the employee to consider himself or herself constructively dismissed.

10. There was no dispute that Daniels had a "regular work week" of five days of full time hours prior to early March. Even though there was no "guarantee" of these hours of work, the reduction to eight hours per week represented a significant change in his terms of employment. This fact alone does not necessarily lead to the conclusion that Daniels argues. Reduction of hours of work, and consequent reduction of pay, may also constitute a "temporary lay-off" within the meaning of subsection 56(1)(c) of the Act in the appropriate circumstances that need be addressed here.

11. The relationship between constructive dismissal and temporary lay-off for the purposes of the Act was central to the Ontario Court of Appeal's decision in *Stolze and Addario et al.*, (1997) 36 O.R. (3rd) 323 to set aside a decision of an adjudicator interpreting similar provisions of the Act. The central error was that she failed to consider whether a thirty-two year employee had been constructively dismissed when his employer laid him off for an indefinite time due to reduced work. Both provisions of the Act must be considered when evaluating a circumstance where the significant change involves reduction of hours (and pay) to less than 50% of the employee's regular hours. The question of which provision is applicable may be determined by examining the history of the employment relationship and any contractual provisions contemplating this sort of dramatic reduction in work hours. In the particular circumstances of Stolze, he was found to have been a "key" employee of the firm who was employed on an indefinite basis and, in the absence of evidence of a "policy or practice" of the employer laying off its "key" employees, his lay-off constitutes constructive dismissal, ie. a "repudiation" of a fundamental term of his contract of employment. Therefore, he was entitled to notice, or pay in lieu, of termination and to severance pay under the Act.

12. Since there was no evidence that Daniel's had a contract that explicitly permitted this sort of reduction of hours if there were fewer patients etc., the question is whether the possibility of a significant reduction in his hours of work and pay could be considered an implied term of his employment. If there is no implied term, the only reasonable alternative is to find that he has been constructively dismissed.

13. I was given no basis for concluding that it was a term or condition of his employment that his hours could be reduced in this way. Daniels had experienced no prior reduction of his hours of this magnitude. There is no suggestion that the reduction of hours was prompted by anything other than Blackmore's genuine problem of sustaining his former practice hours. Daniels also could have no idea of how long his reduced hours would continue because Blackmore did not communicate about the likely time when the circumstances causing the reduction would change. The conclusion that he was constructively dismissed within the meaning of subsection 56(1)(b) of the Act is thus inescapable.

14. The question becomes whether the submission of his resignation occurred within a reasonable time after the commencement of his reduced hours and pay on March 1, 2007. If resignation does not occur within a "reasonable time" in response to a "constructive dismissal" for the purposes of subsection 56(1)(b) of the Act, the employee is deemed to have accepted the situation.

15. Daniels' two weeks' notice of his resignation, given within two weeks of the reduction of his hours, allowed sufficient time to pass in order for Dr. Blackmore to clarify when the reduced hours might end or make other disclosure(s) that could possibly allow Daniels to accept the reduction in hours on an interim basis and preserve his continuity of employment. If Daniels had let much more time pass, it would be increasingly probable that he would be deemed to have accepted the change. Therefore, the argument of Blackmore to the effect that Daniels' resignation disentitled him to notice under section 54 of the Act is contrary to these policy imperatives that permit or encourage an employee to allow enough time to pass to assess the circumstances of the fundamental change while at the same time acting early enough to avoid being deemed to have accepted them. Daniels fulfilled this in his approach to his situation.

DISPOSITION

16. Blackmore is directed to pay forthwith to the Director of Employment Standards on behalf of Daniels $3,603.60 representing termination pay pursuant to section 61 of the Act in the amount of $3,465.00 in lieu of 6 weeks' notice of termination at $577.50 per week and vacation pay at 4% of these wages in the amount of $138.60. If Blackmore fails to make this payment by November 26, 2008, this amount will attract interest from March 30, 2007 to the date of this decision and payment of a 10% administration fee to the Director of Employment Standards.

2303-08-HS; 2345-08-HS Dynamic Properties Inc., Applicant v. Rick Carpenter, Josie Roque and Dave MacDonald, Inspector, Responding Party.

Health and Safety – Timeliness – The applicant filed a request for suspension of an inspector's order on Form A-67 twenty-nine days after the order was issued, but did not file an appeal of the order within the 30-day time limit set out in s. 61(1) of the *Occupational Health and Safety Act* – The issue before the Board was whether the appeal was timely – The Board found that all the information required to initiate an appeal was contained in Form A-67, and the Board's Rules of Procedure allow it to relieve against the strict application of the Rules – The Board relieved against the strict application of Rule 22.1 which requires an appeal to be launched on Form A-65 – The late-filed form was viewed as an amendment of the timely appeal filed four days earlier – Matter proceeds

BEFORE: *Harry Freedman*, Vice-Chair.

DECISION OF THE BOARD; November 4, 2008

1. These are two applications under the *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1 as am. (the "Act") arising out of an order issued by Inspector David MacDonald on September 29, 2008 in FV. No. 5598405 (the "Order"). Board File No. 2303-08-HS is an application under section 61(7) of the Act to suspend the operation of the Order pending the disposition of the appeal. The application in Board File No. 2303-08-HS was made on October 28, 2008 when the Form A-67 prepared by the applicant was received by the Board. Board File No. 2345-08-OH is an appeal of the Order under section 61(1) of the Act. The appeal on Form A-65 was received by the Board on October 31, 2008.

2. At the time the application for a suspension was made, the applicant had not filed an appeal of the Order on Form A-65 with the Board. As a result, the Registrar, by letter to the applicant dated October 28, 2008 advised that the Board would not process the application because it did not comply with Rule 22.4 of the Board's Rules of Procedure in that the application was neither made at a time when an appeal under section 61 on Form A-65 had been filed nor was it accompanied by an appeal on Form A-65 under section 61. Rule 22.4 provides:

> An application under section 61(7) of the *OHSA* will be considered by the Board only where it is accompanied by an appeal under section 61(l) of the *OHSA* or where an appeal under section 61(l) has already been filed with the Board. An application under section 61(7) must be made on Form A-67 and must include all of the information requested on that form.

The Registrar's letter goes on to state:

> If the does not receive your properly completed Form A-65 and Form A-67 within 10 working days of the date of this letter, the proceedings will be terminated.

3. The applicant filed a completed Form A-65 on October 31, 2008. Rule 22.1 of the Board's Rules of Procedure require an appeal of order issued by an inspector under the Act be made on Form A-65. Rule 22.1 provides:

> An application under section 61(1) of the *OHSA* must be made in writing on Form A-65 and must include all of the information requested on that form, including a copy of the Inspector's Order (Field Visit/Report).

4. Section 61(1) of the Act provides:

> Any employer, constructor, licensee, owner, worker or trade union which considers himself, herself or itself aggrieved by any order made by an inspector under this Act or the regulations may appeal to the Board within 30 days after the making of the order.

If the appeal of the Order was made on October 31, 2008, when the Form A-65 was filed with the Board, the appeal was made more than 30 days from the date of the Order and would therefore be untimely.

5. There is nothing in the Act that allows the Board to extend the time prescribed by section 61 within which an appeal must be made to the Board. Simply put, the Board does not have the discretion to extend the time for appealing from an order. See *Lac Des Iles Mine Ltd.*, decision dated August 28, 2006, Board File No. 1589-06-HS, unreported, Q.L. cite [2006] OOHSAD No. 100; reconsideration dismissed, decision dated September 19, 2006, unreported, Q.L. cite OOHSAD No. 111. The Board in its August 28, 2006 decision wrote at paragraphs 5-7:

> 5. An appeal of an order issued by an inspector under the Act must be filed with the Board within 30 days after the making of the order. There is no provision in the Act that permits the Board to extend the time for appealing from an inspector's order. See Wal-Mart, Board File No. 1806-05-HS, decision dated September 7, 2005, unreported, Q.L. cite [2005] O.O.H.S.A.D. No. 128; National Steel Car Limited, Board File Nos. 2958-00-HS, 2959-00-HS, decision dated January 24, 2001,

> unreported, Q.L. cite [2001] O.O.H.S.A.D. No. 8; Toronto Catholic District School Board, Board File No. 0179-00-HS, decision dated April 27, 2000, unreported, Q. L. cite [2000] O.O.H.S.A.D. No. 82; National Grocers Cash & Carry, Board File No. 1900-00-HS, decision dated October 4, 2000, unreported, Q.L. cite [2000] O.O.H.S.A.D. No. 168; Ministry of Natural Resources, Board File No. 1895-00-HS, unreported, decision dated September 29, 2000, Q.L. cite [2000] O.O.H.S.A.D. No. 166.
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> 6. In Cambridge Towel Corporation, Board File No. 0493-01-HS, decision dated May 14, 2001, unreported, Q.L. cite [2001] O.O.H.S.A.D. No. 69, application for reconsideration dismissed, decision dated June 8, 2001, unreported, Q.L. cite [2001] O.O.H.S.A.D. No. 82 the appellant gave a courier the appeal documents on May 8, 2001 for overnight delivery to the Board, before 9 a.m. The last day for filing an appeal of the Inspector's order was May 9, 2001. The courier did not deliver the documents to the Board until the morning of May 10, 2001. The Board, in dismissing the appeal, wrote at paragraph 4:
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>> It appears that the appellant gave the appeal documents to the courier service on May 8, 2001 with the expectation that those appeal documents would have been delivered to the Board by May 9, 2001. The envelope containing the appeal materials was not actually received by the Board until 8:11 a.m., May 10, 2001. As the appeal in writing was received by the Board on May 10, 2001, that was the day when the appellant made its appeal to the Board. The last day for appealing the Order was May 9, 2001, as the Order had been issued on April 9, 2001. Since the Board does not have the authority or power to relieve against the time limit for appealing an order of an inspector under the Act and as this appeal is untimely because it was made one day late, it must be dismissed.
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> In the Cambridge Towel Corporation decision dismissing the request for reconsideration, the Board wrote at paragraph 3:
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>> The Board noted in its May 14 decision that the there is no provision in the Act or the Board's Rules that permits the Board to extend the time for appealing an inspector's order. The Act sets out the time within which an appeal of an order must be made. If the Board had the authority to extend the time for filing an appeal, there is no doubt that the circumstances of this case would warrant the Board granting an extension. The appeal was filed one day late through no fault of the appellant. Although the appellant acted in a timely way by giving the appeal documents to a courier who was to deliver the documents to the Board by 9 a.m. the next day, the courier did not do so. The appellant in its request for reconsideration has not provided the Board with any statutory basis or legal theory on which the Board could rely to extend the time for filing the appeal. The Board held that it does not have the power to extend the time for filing an appeal under the Act when it dismissed the appeal. The appellant has not made any submission that suggests the Board was in error on that point.
>
> 7. The Act does not permit the Board to extend the time within which an aggrieved party may appeal an Inspector's order to the Board.

6. The issue before the Board in this proceeding is whether the appeal from the Order was made on October 31, 2008 when the Form A-65 was filed, or was it in fact made earlier, on October 27, 2008 when the applicant filed its request for suspension on Form A-67.

7. The information required by Form A-65 is also contained in Form A-67. While the Board does not have the discretion to extend the time within which an appeal must be made, it does have the discretion under Rule 40.7 of the Board's Rules of Procedure to relieve against the strict application of the Rules when it is advisable to do so. The form on which an appeal is made to the Board is established by the Board's Rules. Therefore, the Board can under Rule 40.7 relieve against a failure to use the correct form on which to make an appeal.

8. In my view, given that the appellant had made its request for a suspension within the time prescribed for appealing from an order, and since the information contained on Form A-65 was already set out in the Form A-67 it had filed earlier, I am satisfied it is advisable, in these circumstances, to relieve against the strict application of Rule 22.1. Both the appeal from the Order and the application for suspension of the Order were made on October 27, 2008 on the same form when the appellant filed its application on Form A-67.

9. The Board under Rule 40.5 may allow a filing to be amended as the Board considers advisable. The subsequent filing of Form A-65 is properly viewed as an amendment of the timely appeal that had been filed four days earlier. Therefore, as the Board allows the amendment of the appeal initially contained on Form A-67, the appeal from the Order is now set out on Form A-65.

10. These two matters are referred to the Registrar to be processed in accordance with the Board's Rules of Procedure.

11. This panel of the Board is not seized with these matters.

1940-08-R Sheet Metal Worker's International Association Local 540, Applicant v. **Excel Steel Ltd.**, Responding Party

Certification – Construction Industry – The union sought to withdraw its challenges to the employer's list following a representation vote and requested, in addition, that the Board dismiss the application without a bar, pursuant to the employer's s. 8.1 notice, because the union acknowledged that it had less than 40% support of the individuals in the bargaining unit – The union, however, had already agreed to a bargaining unit that had the support of 41% of the employees in it – The Board held that the union could not invoke s. 8.1 of the Act after it had agreed the number of employees in the bargaining unit was more than 40%, and after a representation vote had been held – The Board determined that the application must be dismissed either under 10(2) or 7(10) of the Act

BEFORE: *Brian McLean*, Vice-Chair.

DECISION OF THE BOARD: November 20, 2008

1. This is an application for certification.

2. This application was filed on September 25, 2008. In its application the applicant advised the Board and the employer that it estimated there were twelve persons in the bargaining unit it applied for. The union filed eight membership cards with its application. The employer filed a timely

response to the application. In its response the employer gave the Board notice under section 8.1 of the *Labour Relations Act, 1995* (the "Act") that it disagreed with the union's estimate of the number of employees in the bargaining unit. It asserted there were eighteen employees in that unit. However, the employer agreed that the ballots cast in any representation vote could be counted.

3. By decision dated September 30, 2008 the Board ordered a representation vote. The Board also advised the parties that the employer's section 8.1 notice was "numerically relevant". That is, if the employer's estimate of the number of employees in the bargaining unit was correct, the union might not have the support of 40% or more employees in the bargaining unit.

4. The representation vote was held on October 2, 2008. Sixteen people voted. Four persons voted in favour of the union, seven persons voted against the union. The ballots of five persons who cast ballots were challenged by the union and were segregated and not counted.

5. Prior to the representation vote the parties agreed that one person on the employer's list was not in the bargaining unit. Accordingly, there were a maximum of seventeen employees in the bargaining unit. Although the employer did not know it, seven of the membership cards filed with the application matched the employer's list (41%).

6. On October 7, 2008 the union wrote to the Board, in relevant part, as follows:

> A representation vote was held in respect of the above-noted matter on Thursday, October 2, 2008. The Union hereby withdraws its challenge to those 5 persons. Additionally, the Union acknowledges that less than 40% of the individuals in the bargaining unit were represented by the trade union on the Application Filing Date and consents to this Application being dismissed under section 8.1 of the *Labour Relations Act, 1995*.

7. The union did not say anything about the employee who was challenged on the employer's list but did not vote.

8. On October 8, 2008 the employer advised the Board that it was withdrawing its section 8.1 notice. It asserted that since there had been no determination by the Board under section 8.1 then the s. 8.1 issue was live and the employer could withdraw its section 8.1 notice with the result that the union's application would be dismissed under s. 10 rather than s. 8.1:

> There has been no determination whatsoever by the Board as anticipated under Section 8.1(5) of the Act. Further, as outlined above, the non-segregated ballots have been counted, the Union has been unsuccessful and the Union has agreed that the Application for Certification should be dismissed as a consequence.
>
> In the prevailing circumstances, the Responding Party respectfully submits that there is no basis for the Board to dismiss this Application under Section 8.1 of the Act as there has been no proof that the Union had less than 40% support in accordance with paragraphs 6 and 7 of section 8.1(5) of the Act and the ballot box was not sealed and the ballots in the box were counted as outlined above.
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> We note that the Union has also withdrawn its challenges to the 5 segregated ballots, the Responding Party accepts the Union's withdrawal of its remaining

> challenges and acknowledges that the 5 individuals in question are considered to fall within the subject bargaining unit applied for by the Union.

9. The Board invited submissions from the parties, which were provided. This decision determines whether this application is to be dismissed under s. 8.1(5)7 or s. 10(2) of the Act.

Decision

10. A similar issue has been dealt with by the Board before in the context of somewhat different facts. In *Universal Workers Union, Labourers' International Union of North America, Local 183* and *Dagmar Construction Inc.*, [2003] OLRB Rep. Nov./Dec. 1029 (Dec. 5, 2003) the Board stated:

> 13. If the Board were to permit an employer withdrawal of a section 8.1 notice in a certification application following an applicant union conceding all underlying facts as asserted by the employer, the result in every case would be the dismissal of the certification application and the imposition of the statutory one-year bar under section 7(10) of the Act. On that interpretation, no union would agree to the employer's position on which employees should be included in the bargaining unit. Instead, the union and employer would be forced to litigate the list issues before the Board in order for the applicant union to have the application dismissed under paragraph 7 of section 8.1(5) and avoid the statutory bar. To compel such a result would make no labour relations sense whatsoever and would lead to an enormous waste of resources for unions, employers and the Board. Neither the decision in *Martha's Garden* nor that in *Sobeys* compels such a drastic outcome and both cases are clearly distinguishable in any event.

11. In *Dagmar* there was a potential list of employees which included 20 individuals. Fifteen persons cast ballots, ten of whom were challenged by the applicant union. Following the vote the union withdrew its ten challenges. Two days later the employer withdrew its section 8.1 notice and following that the Board issued its decisions.

12. The difference between *Dagmar* and the case before me is that in *Dagmar* the number of challenges ensured that there was a live and numerically relevant section 8.1 issue. Here, the result of the union and employer's agreement on the day of the representation vote is that there were either sixteen or seventeen employees in the bargaining unit. Seven of the eight membership cards filed by the union matched the list (whether it is 16 or 17). Accordingly, once the union and the employer had narrowed the list down through their agreements, the union had the support of 40% or more of employees in the bargaining unit (whether the number of employees in the bargaining unit was 16, 17 or less). I note that while the employer knew that the union had filed eight membership cards with its application it may not have known how many of those cards matched the employer's list.

13. In most circumstances when the union concedes the s. 8.1 issue, what that means is that it concedes as a fact that the employer's list of employees is correct. The consequence of that agreed fact in most cases, is that the union acknowledges that the number of cards that it has submitted (which is on the Form A-4 that has likely already been circulated to the employer) is less than 40% of that number. The only thing that the union can concede is the employer's statement of the number of employees in the bargaining unit and the list of the employees that corresponds to that statement. The legal result that flows from that concession is found in the Act.

14. In this case, the union's concession regarding the employer's list does not lead to that result. The union filed membership evidence such that it has the support of 41% of employees in the bargaining unit on the largest possible list. The agreement of the parties as to the maximum number of employees on the list should not be subject to revision. In my view it is not open to the union to try to go back to a set of facts that the employer once wished to espouse, but no longer does. It is stuck with the list that was agreed to.

15. If the parties have agreed on a list, to allow the union to "concede" that there is some larger list is in effect allowing a party to renege on an agreement about the list that it made. Any process of letting parties do that would do enormous damage to the process that the Board enforced of requiring parties to live up to the agreements that they have made.

16. While it could be argued that the union made its concession before the Board has made its determination, such an approach would undermine the agreements of the parties. The administration of the vote system requires that we give effect to, and rely upon, those agreements.

17. Thus, the union's application must be dismissed pursuant to s. 10(2) of the *Act* or be treated as a withdrawal after a vote pursuant to s. 7(10) of the Act. The attention of the workplace parties is drawn to the potential consequences of those actions which are identified in the Act.

18. The Registrar will destroy the ballots cast in the representation vote taken in this matter following the expiration of 30 days from the date of this decision unless a statement requesting that the ballots should not be destroyed is received by the Board from one of the parties before then.

19. The responding party is directed to post copies of this decision immediately, adjacent to all copies of the "Notice of Vote and of Hearing" posted previously. These copies must remain posted until the date that had been set for the hearing.

0059-08-R The Formwork Council of Ontario, Applicant v. **Gotham Structural Group Inc.** and Durocast Structural Group Inc., Responding Parties v. Canadian Construction Workers Union, Intervenor

Conflict of Interest – Practice and Procedure – The Board noted that there has been an increase in the frequency of motions to remove counsel of record from particular applications due to alleged conflicts of interest – The Board held that such allegations are serious challenges to a lawyer's professionalism and should not be treated casually – Assuming a role analogous to the Superior Court in similar circumstances, the Board in the instant case issued a direction and schedule for the exchange and delivery of declarations as to the facts (and supporting documents) on which the parties rely in the motion – Matter continues

BEFORE: *David A. McKee*, Vice-Chair.

DECISION OF THE BOARD: November 5, 2008

1. This is an application brought pursuant to subsection 1(4) and section 69 of the *Labour Relations Act, 1995*, S.O. 1995, ch.1, as amended (the "Act"). The applicant, The Formwork Council of Ontario (composed of Labourers' International Union of North America Local 183 ("Labourers Local 183") and the International Union of Operating Engineers, Local 793) seeks a declaration that the responding parties ("Gotham" and "Durocast") are one employer for all purposes of the Act or that there has been a sale of business pursuant to section 69 of the Act. The Canadian Construction Workers' Union ("CCWU") has intervened in the application asserting that it has a collective agreement with Durocast, the "target" of the application.

2. The intervention on behalf of the CCWU was originally filed by a different law firm from current counsel to the CCWU. That firm was replaced on September 2, 2008 by Mr. Comartin. On September 10, 2008, Labourers Local 183 objected to Mr. Comartin's presence as counsel alleging that he was in a position of conflict. Mr. Comartin retained another lawyer to act for him. Labourers Local 183 objected to the lawyer representing Mr. Comartin, again on the grounds of conflict. That lawyer removed himself from the record so that the hearing would not be bogged down in endless motions about conflict. Mr. Comartin then retained his current counsel.

3. In *Universal Workers Union*, [2004] OLRB Rep. Mar./Apr. 471 (Apr. 5, 2004), the Superior Court of Justice determined that both the Court and the Board had concurrent jurisdiction to deal with conflict of interest issues, but that the Board should hear the matter first. Since then, the Board has received a number of motions that counsel be removed from the record on the basis of an allegation of a conflict of interest. The number is small relative to the number of applications the Board determines, but is certainly greater than the number of such motions that were brought before 2004, either in the Superior Court of Justice or anywhere else, concerning lawyers who appeared before the Board.

4. The Board does not require a great deal of formality about pleadings after the initial application or response, and such matters are typically raised by a letter addressed to the Board and copied to the other parties. The casual nature of the manner of raising the issue can lead to a certain casualness about the decision to raise the issue in the first place. The allegation of a conflict of interest is not a matter to be raised casually. It contains a measure of criticism of counsel in his or her professional capacity. An allegation of improper action in the course of one's professional activities is a very serious matter for any lawyer. It is not a matter to be approached casually, or for tactical purposes.

5. It may be that the Board's approach to pleadings encourages this type of allegation to be raised too easily. If a motion were made in court, there would be the need for a properly articulated motion record, supporting affidavits, potential cross-examination on the affidavits and likely a factum. The prospect of costs is also a reality in bringing such a motion, particularly if the Court decides that the motion lacked much substance. The prospect of costs on a full recovery basis tends to focus a litigant's attention on what is at stake. Certainly the whole process is likely to inspire significantly more thought than sending a letter to the Registrar.

6. The sequence of events in this case is a good example of the problem. The particulars of the alleged conflict were contained in two letters dated September 27, 2008 and October 6, 2008. The allegations are careful to point out what it is that Labourers Local 183 is not saying about Mr. Comartin. Beyond that, the allegation is not one that is made with any great precision. At the opening of counsel's submissions, I advised him that it seemed to me that the "confidential

information" was no greater information than anyone involved in litigation with Labourers Local 183, either for or against, would have acquired in the course of a public hearing. Counsel undertook to address that concern by demonstrating more of the facts that were to be found in a book of documents filed in the proceeding. These books of documents were not delivered to Mr. Comartin and his counsel until the Board ordered the applicant to do so. The CCWU had been asking for such documents as early as the day on which the intervention was filed.

7. For his part, counsel for Mr. Comartin advised the Board that he wished to defend the motion by calling evidence from Mr. Comartin. Specifically he wished to call evidence that would lead to what he characterized as a "waiver" of the solicitor-client privilege attaching to whatever it was Labourers Local 183 was complaining about. The evidence as outlined made reference to 40 volumes of transcripts of hearing before a Commissioner appointed in internal processes pursuant to the Labourers' International Union of North America Constitution, and 30 or 40 affidavits filed before this Board. Mr. Comartin did not have copies of any of these since they had been returned to Labourers Local 183 by order of the Superior Court of Justice. This allegation of waiver was made for the first time on October 14, 2008, the first day of hearing in this matter. On the other hand, counsel did not receive all of the documents on which Labourers Local 183 was relying until the morning of October 14, 2008 either.

8. An allegation that a lawyer should not be acting because of a conflict of interest and a motion that the Board remove him or her from the record is both a serious matter, and one that is a long way from the Board's core functions. It is certainly not a matter dealt with explicitly by the Act. In *Universal Workers Union, supra*, the Court found that the Board and the Superior Court of Justice had concurrent jurisdiction. In *Universal Workers' Union, Labourers' International Union of North America, Local 183 v. Ontario Labour Relations Board*, [2007] OLRB Rep Mar./Apr. 466, [2007] O.J. 1048 (Mar. 21, 2007), the Divisional Court came to two fundamental conclusions. Because it determined that the Board had no particular expertise in this subject matter, and indeed had less than the Court, the Court would not give any particular deference to the decision of the Board. That consideration, among others, led the court to conclude that the standard of review was correctness. The Court would (and did in that case) feel free to substitute its own view of the law for that of the Board. It is after all a matter of applying judge-made common law rather than the statutory provisions in respect of which the Board has developed its expertise.

9. Since that decision was rendered, the Supreme Court of Canada has revisited the analysis of the standard of judicial review in *Dunsmuir v. New Brunswick*, 2008 SCC 9. Following the analysis in *Dunsmuir, supra*, a single judge of the Alberta Queen's Bench came to a different conclusion from that of the Divisional Court in *Alberta Union of Provincial Employees v. United Nurses of Alberta* [2008] A.J. No 772 (July 8, 2008). However, that does not change the Board's task, which is to decide the question in the manner that appears to the Board to be correct, in a manner that is in keeping with the need to determine the main labour relations issue in an efficient and timely manner.

10. Because of the seriousness of the allegations for the lawyer involved in the motion, and the location of the relative expertise of the Court and the Board on the subject, it is appropriate for the Board to adopt a procedure that is close to that of the Superior Court of Justice, while preserving the need for the Board's ability to respond expeditiously to the on-going reality of labour relations. The potential for the use of any procedure the Board adopts to be used for delay or other tactical purposes is always present. The Board has no jurisdiction to award costs on any basis. The reality of labour

relations is usually about on-going relationships where the relief is often about what employers, unions and natural persons must do in future, rather than a monetary compensation for a past injury. The Board must preserve the ability to act quickly when the situation requires it.

11. Therefore by decision given orally at the hearing and reduced to writing on October 16, 2008 I ordered as follows:

> (a) On or before October 31, 2008 Labourers Local 183 is to deliver to the Board and to the other parties one or more Declarations as to all facts on which they rely in this motion, with all documents to which the Declarations refer, attached to it or them (preferably in bound form without duplication of existing material).
>
> (b) After that time I will review the Declarations to determine if the motion raises any issue of substance, assuming all facts contained in it are true. If I conclude that they may not raise such an issue, I will require submissions in some form (oral or written) before any decision is made. The parties are directed not to make any submission about this review unless directed to, and to assume that the entire process will be carried through to completion unless advised otherwise. I may issue no decision at all.
>
> (c) As soon a possible, but no later than October 31, 2008, Labourers Local 183 will make available to Mr. Comartin the volumes of transcripts from the hearings before the Canadian Independent Hearings Officer, and the affidavits (without supporting documents) for his review, and if necessary, copying.
>
> (d) On or before November 28, 2008 Mr. Comartin and the CCWU are to deliver to the other parties one or more Declarations as to all facts on which they rely in this motion with all documents referred to therein attached to it or them (preferably in bound form without duplication of existing material).
>
> (e) On or before December 3, 2008, the responding parties may file any material, in similar form, they wish to file. They may wish to file nothing.
>
> (f) On or before December 15, 2008 Labourers Local 183 may file any Declarations and supporting documents they wish to file in response to any new matter raised by the CCWU or Mr. Comartin.

These dates have all been adjusted by counsel on agreement to a date one week later than the dates set out in the above decision. Had these reasons been delivered before that time, I might well have refused the adjournment sought.

12. The comments of the Court of Appeal in *Cedarvale Tree Services Ltd. and Labourers International Union Local 183* (1971) 22 D.L.R. (3d) 40 at p. 49 on this section are frequently cited for the general proposition that the Board is the master of its own procedure:

> … under the *Labour Relations Act*, the Board is master of its own house not only as to all questions of fact and law falling within the ambit of its jurisdiction conferred on it by the Act, but with respect to all questions of procedure when acting within that jurisdiction. In my view, the only rule which should be stated by the Court (if it be a rule at all) is that the Board should, when its jurisdiction is questioned, adopt such

> procedure as appears to it to be just and convenient in the particular circumstances of the case before it.

13. Specifically with respect to interim motions such as this, section 98 (1) (a) provides:

> **98. (1)** On application in a pending proceeding, the Board may,
> (a) make interim orders concerning procedural matters on such terms as it considers appropriate.

14. Pursuant to that subsection, the Board has created Rule 41.2 pursuant to, among other sections of the Act, section 98. The Rule provides:

> 41.2 In order to expedite proceedings, the Board or Registrar may, on such terms as either considers advisable, consult with the parties, conduct a pre-hearing conference, issue any practice direction, shorten or lengthen any time period, change any filing or delivery requirement, schedule a hearing, if any, on short notice, or cancel such hearing, or make or cause to be made such examination of records or other inquiries as either considers necessary in the circumstances.

15. In addition, of course, the Board is empowered by subsection 111(2)(e) to accept oral or written evidence whether or not admissible in a court of law.

16. In fact, this process follows closely the process that would, in the normal circumstances, be followed by the Superior Court in dealing with such motions in a civil action. The only difference is the process by which the Board may shorten the process by requiring the moving party to argue the case on its own best facts, or may deprive the party seeking to cross-examine on a particular area of the opportunity to do so. Given the need for expedition in labour relations matters generally, and the absence of any power of the Board to award costs, these are appropriate modifications of the court's process, if in fact they are ever used.

17. The Board adopted a similar, somewhat more formal, process with respect to a constitutional issue in *Mississaugas of Scugog Island First Nation*, [2003] OLRB Rep. Nov./Dec. 1035 (Dec. 12, 2003). The process was examined by Divisional Court on judicial review (reported at [2006] OLRB Rep. May/June 450) which concluded that "the OLRB had the authority to conduct the proceedings as it did" (paragraph 103). The matter was not the subject of comment by the Ontario Court of Appeal (reported at [2007] OLRB Rep. Nov./Dec. 1197).

18. It may be that, as the Board develops greater experience in dealing with such motions, it may well adopt a more court-like process, including affidavits, and the use of cross-examination outside the Board resulting in transcripts to be filed. In retrospect, the time limits might have been much tighter than those set in this case. It is also possible that the Board will refuse even to entertain this type of motion if the motion is not set out with specific particulars in the manner set out above.

0059-08-R The Formwork Council of Ontario, Applicant v. **Gotham Structural Group Inc.** and Durocast Structural Group Inc., Responding Parties v. Canadian Construction Workers Union, Intervenor

Construction Industry – Conflict of Interest – Practice and Procedure – Related Employer – Sale of Business – The Formwork Council, relying on the interests of its affiliate Local 183, brought a motion to have C removed as counsel for CCWU, as C had acted for Local 183 in proceedings before the Board, the court and an Independent Hearings Officer, in the feud between LIUNA and Local 183 – The motion was based on the possibility that since C received confidential information he would now be in a position to use it against Local 183 or that he owed a duty of loyalty to Local 183 – First, the Board found that the application will be decided on the existence of a collective agreement (or the abandonment of bargaining rights), both matters which turn on the specific facts before the Board and not on some past, internal standard that may have been set by Local 183 – Accordingly the Board found there was no possibility that the factual or legal issues of this case could give rise to any possibility that confidential information that C obtained during his Original Retainer would be in any way connected to or relevant to the application – Second, the Board found that the duty of loyalty is only engaged if the lawyer acts against the former client in a later action with respect to matters that relate to the factual and legal issues that arose in the Original Retainer – The Board found that the facts relevant to this case do not require C to revisit or deal with any issues in respect of which he acted for Local 183 during the trusteeship application – Motion to disqualify dismissed – Matter continues

BEFORE: *David A. McKee*, Vice-Chair.

APPEARANCES: *Alan Minsky* and *Nick Keresztesi* for the applicant; *Adrian Jakibchuk* for Durocast Structural Group Inc.; *Eric Comartin, Alick Ryder* and *Chris Bryden* for the intervenor; *Alick Ryder* for Eric Comartin; no one appearing for Gotham Structural Group Inc.

DECISION OF THE BOARD: December 22, 2008

Introduction

1. This decision deals with a motion by the applicant ("Formwork Council") to remove Mr. Eric Comartin as counsel for the Canadian Construction Workers Union ("CCWU") in this matter. Briefly, the application is brought by the Formwork Council under subsection 1(4) and section 69 seeking to have the Board declare that Gotham Structural Group Inc. ("Gotham") and Durocast Structural Group Inc. ("Durocast") are one employer pursuant to subsection 1(4) or that there has been a sale of a business from Gotham to Durocast. Gotham is a company no longer active, but which was said to be bound to a collective agreement with the Formwork Council. Durocast resists the application for a number of reasons, and states that it should be dismissed. The CCWU has intervened. It asserts that it has a collective agreement with Durocast and that this collective agreement should serve as a bar to the relief sought by the Formwork Council. It also asserts other reasons why the Board ought not to grant the relief sought.

2. The Formwork Council relies on the interests of Universal Workers Union, Labourers International Union of North America, Local 183 ("Local 183"), one of the affiliates of the Formwork Council, and indeed likely the most significant affiliate. It asserts that Mr. Comartin was a member of the firm which once acted for Local 183, and indeed acted himself extensively in that retainer, and that he ought to be restrained from acting for the CCWU against his former client, or the Council of which it is a member. No party drew any distinction between Local 183 and the Formwork Council for the purposes of this motion. There are two bases for this motion:

(1) In the course of Mr. Comartin's retainer by Local 183 ("the Original Retainer"), he received or possibly received confidential information that he would now be in a position to use against Local 183; or

(2) Mr. Comartin owes a duty of loyalty to Local 183 which should prevent him from acting against it in this case.

3. On December 1, 2008 I issued a brief decision dismissing the motion. This decision constitutes the reasons for dismissing it.

The Facts

4. Local 183 is the largest local union within the Labourers International Union of North America. It appears to have more than a quarter of the overall membership. It has been enormously successful in expanding and consolidating its representation of construction workers in Ontario (and indeed in other industries besides). For many years, the business manager was Mr. Antonio Dionisio. As business manager, he was the chief officer of Local 183. Other persons were, of course, officers and agents of Local 183, some of whom were closely allied to Mr. Dionisio.

5. As in any union organization, there was some friction for long periods of time between Local 183 and its parent international union, Labourers International Union of North America ("LIUNA" or "the IU"). At some point in 2002 or 2003, this friction evolved to the level of an irreconcilable conflict. The International Union began to take a number of steps to assert control over Local 183 and imposed, or attempted to impose, a trusteeship on it. After certain litigation before the Board, all parties agreed to submit the dispute to an officer appointed under the terms of the LIUNA Constitution known as the "Canadian Independent Hearing Officer" ("CIHO"), Mr. Brian Keller. Mr. Keller was a well-known and well-respected labour arbitrator, otherwise unconnected to the Labourers' Union. His task was to hear the evidence from LIUNA and Local 183 and to determine whether or not LIUNA had just cause to impose a trusteeship.

6. LIUNA formalized its complaints about Local 183 in sixteen charges or "Findings" from its investigation. Each of these Findings was alleged to be a breach of the LIUNA Constitution and the uniform Local Union Constitution of LIUNA, and that each such violation constituted just cause for imposing trusteeship. The sixteen Findings were set out in an appendix to Mr. Keller's decision and consisted of all of Local 183's alleged violations. They ranged from allegations of negligence to conduct tantamount to criminal behaviour. The complaints ranged from maintaining "inadequate financial controls" and failing to enforce the terms of collective agreements to serious charges of exploiting undocumented workers and forging of collective agreements. In the end, Mr. Keller found that only three of these Findings were proved and that they constituted just cause for the trusteeship. However, all sixteen of the Findings were litigated before him.

The Original Retainer

7. Local 183 was represented by the firm of Shell Lawyers throughout these proceedings before the OLRB, the courts and Mr. Keller. The two lawyers principally involved in the defence of Local 183 were Brian Shell and Eric Comartin. The instructing officers of Local 183 were Antonio Dionisio, and others. It is undisputable that the retainer was very broad, much like the territory covered by the Findings. The inquiry covered both specific allegations of wrongdoing, such as the

forging of certain collective agreements, and more general complaints about the general record-keeping and accounting practices of the Union, and the manner in which the Union treated whole groups of people within its ranks. Local 183's lawyers received extensive information about Local 183's methods of operating as a local union and its manner of administering its various collective agreements.

Results

8. Ultimately, Mr. Keller found that three (actually four, since two of them were combined) of the LIUNA's Findings were factually correct and that they constituted both a breach of the Constitution and just cause for the imposition of trusteeship. The trusteeship was imposed shortly thereafter (after a further hearing before the OLRB) and LIUNA took control of Local 183 following a decision of the Board on June 12, 2006. Mr. Dionisio and others were removed from office and later expelled entirely from the Union. They founded the CCWU. Its aims are clearly to act as a rival to Local 183 in organizing construction workers and to displace it whenever possible. There is nothing wrong with this ambition; it is perfectly lawful and hardly a surprising result of the International Union's action. There have been a number of cases before the Board in which the two have clashed and many more are pending. This application is simply one of them.

Post-Trusteeship Litigation

9. After LIUNA imposed a trusteeship, there continued to be certain litigation between Mr. Dionisio and others, on their own behalf against the International Union, and by definition, against Local 183, which was under the control of the IU. Mr. Comartin had left the firm of Shell Lawyers at around the time the trusteeship became effective (June 12, 2006), and he was not involved to any great extent, if at all, in the litigation after June 12, 2006. Mr. Shell acted for the former executive members of Local 183 and other members of Local 183. A motion was brought before this Board to remove Mr. Shell from the record, which was dismissed. However, the Divisional Court quashed that decision and ordered Shell Lawyers to cease to act for Mr. Dionisio and others against Local 183. In a related motion, Shell Lawyers was required to return all client documents to Local 183. More of this will be discussed below. The litigation did not carry on much past that point, as Mr. Dionisio and others focussed their efforts on the CCWU. As noted, Mr. Comartin had parted company with Shell Lawyers before any of the post-June 12, 2006 decisions were issued.

This Application

10. This application was filed April 3, 2008. It alleges that Gotham was a formwork contractor that entered into a collective agreement with the Formwork Council on November 6, 1996. It became bound at that time by signing a one-page "pick-up" agreement binding it to the terms and conditions of the Formwork Council agreement. That collective agreement ceased to operate on May 8, 1998 after the Minister issued a No-Board report. Sometime after that, Gotham became inactive. Durocast was incorporated on July 12, 2007. It is alleged that Anthony Cipriani was the sole officer and director of Gotham and that he exercises some control over Durocast along with Dominic Cipriani. It is further alleged that the two Messrs. Cipriani have incorporated Durocast in order to avoid the bargaining rights of the Formwork Council with respect to employees of Gotham.

11. Gotham has not responded to the application. Durocast has filed a response stating, in summary:

(1) Gotham ceased to do business in March of 1999;

(2) Dominic Cipriani was the controlling mind of Gotham, Anthony (Antonio) Cipriani is the controlling mind of Durocast;

(3) The scope of the work of the two companies is different;

(4) Durocast has pleaded: "the responding party puts the applicant to the strict proof that it had bargaining rights with Gotham and demands all particulars and documents with respect to its alleged bargaining rights with Gotham;

(5) Local 183 knew about the existence of Durocast, but could not supply it with workers;

(6) Since Local 183 was unable to obtain a supply of workers, Durocast declined to execute a collective agreement with Local 183, but turned instead to the CCWU as a source of construction workers and later executed a collective agreement with the CCWU.

12. The CCWU intervened on April 17, 2008 and made certain allegations as well, including:

(1) It had a collective agreement with Durocast which ought to serve as a bar to any relief sought by Local 183;

(2) It is alleged that Local 183 was aware of the agreement as early as October 2007 when Mr. Lotito, a business agent of Local 183 visited a building site in Port Perry;

(3) Mr. Lotito simply warned Anthony Cipriani not to undertake forming work in the Toronto area;

(4) It alleges that Local 183 has abandoned its bargaining rights and made no attempt to enforce its bargaining rights or administer its collective agreement until April 2008.

13. The CCWU's intervention was originally filed by another firm of lawyers. That firm was retained and instructed by Mr. Dionisio, the former business manager of Local 183 and now the president of the CCWU. No objections were taken to the lawyers originally retained to act for the CCWU. On September 2, 2008 the CCWU advised the Board that Mr. Comartin would be acting for it. His business address is given as "c/o The Canadian Construction Workers Union". The Formwork Council then filed this motion.

Bases of the Motion

14. By letter dated September 10, 2008, the Formwork Council asserted that Mr. Comartin, as a member of Shell Lawyers, acquired confidential information concerning Local 183 and various collective agreements with or binding on it, including the Formwork Agreement. In addition, it

argued that Mr. Comartin owes a duty of loyalty not to act against Local 183 or its interests. By further letter dated October 6, 2008, it added the following:

> "We are not suggesting that Mr. Comartin has personal knowledge of the within application, per se, but rather claim … by virtue of [his] involvement in Local 183's affairs, including its legal proceedings for the almost three years in question, Mr. Comartin either has or certainly might have acquired confidential information concerning the Formwork Agreement, including Local 183's affiliation with the Formwork Council".

When directed by the Board, Local 183 filed a further declaration by Mr. Nicholas Keresztesi setting out its challenge in more detail. Reduced to its essence, the statement identifies three areas where Local 183 asserts that Mr. Comartin has relevant confidential information. These are:

> (1) Mr. Comartin became familiar with the many and diverse aspects of the operation or administration of Local 183, including the enforcement, operation and/or administration of the various collective agreements binding upon Local 183;
>
> (2) Durocast contests the validity of the "pick-up" agreement, which was a typical "pick-up" agreement, signed with many other contractors, and those collective agreements were in issue before Mr. Keller;
>
> (3) The CCWU asserts that Local 183 did not enforce the Formwork Agreement, which is the same type of complaint made against Local 183 before the CIHO.

Legal Issues

15. There is no dispute that a lawyer may, at a later time, act against a party that was formerly a client. Courts and commentators have frequently referred to the rules of professional conduct or the Canadian Bar Association's rules. In Ontario, the Law Society of Upper Canada has made the following rule:

> **Acting Against Client**
>
> (4) A lawyer who has acted for a client in a matter shall not thereafter act against the client or against persons who were involved in or associated with the client in that matter
>
> (a) in the same matter,
>
> (b) in any related matter, or
>
> (c) save as provided by subrule (5), in any new matter, if the lawyer has obtained from the other retainer relevant confidential information
>
> unless the client and those involved in or associated with the client consent.

> Commentary
>
> It is not improper for the lawyer to act against a client in a fresh and independent matter wholly unrelated to any work the lawyer has previously done for that person and where previously obtained confidential information is irrelevant to that matter.

The Canadian Bar Association was quoted by the Supreme Court of Canada in 1990 as maintaining the following rule:

> 11. A lawyer who has acted for a client in a matter should not thereafter act against him (or against persons who were involved in or associated with him in that matter) in the same or any related matter, or place himself in a position where he might be tempted or appear to be tempted to breach the Rule relating to Confidential Information. It is not, however, improper for the lawyer to act against a former client in a fresh and independent matter wholly unrelated to any work he has previously done for that person.

(The CBA's rules are now much more elaborate, but to the same effect.) As noted, the basis for the challenge to Mr. Comartin is that he does, or may possibly have, confidential information that is relevant to the issues in this application and further, even if he does not, he owes a duty of loyalty to Local 183 not to act against it in this matter. I will deal with each of these separately.

Possibility of Confidential Information

16. The leading case in this area is *MacDonald Estate v. Martin* [1990] 3 S.C.R. 1235, which put it this way at pages 1260-1261:

> 45. Typically, these cases require two questions to be answered: (1) Did the lawyer receive confidential information attributable to a solicitor and client relationship relevant to the matter at hand? (2) Is there a risk that it will be used to the prejudice of the client?
>
> 46. In answering the first question, the court is confronted with a dilemma. In order to explore the matter in depth may require the very confidential information for which protection is sought to be revealed. This would have the effect of defeating the whole purpose of the application. American courts have solved this dilemma by means of the "substantial relationship" test. Once a "substantial relationship" is shown, there is an irrebuttable presumption that confidential information was imparted to the lawyer. In my opinion, this test is too rigid. … In my opinion, once it is shown by the client that there existed *a previous relationship which is sufficiently related to the retainer from which it is sought to remove the solicitor*, the court should infer that confidential information was imparted unless the solicitor satisfies the court that no information was imparted which could be relevant. This will be a difficult burden to discharge. Not only must the court's degree of satisfaction be such that it would withstand the scrutiny of the reasonably informed member of the public that no such information passed, but the burden must be discharged without revealing the specifics of the privileged communication. Nonetheless, I am of the opinion that the door should not be shut completely on a solicitor who wishes to discharge this heavy burden.
>
> 47. The second question is whether the confidential information will be misused. A lawyer who has relevant confidential information cannot act against his client or

> former client. In such a case the disqualification is automatic. No assurances or undertakings not to use the information will avail. The lawyer cannot compartmentalize his or her mind so as to screen out what has been gleaned from the client and what was acquired elsewhere. ... [emphasis added]

17. The terms of the Original Retainer make it clear that Mr. Comartin received information that was confidential and was attributable to a solicitor and client relationship. The question here is whether that information is "sufficiently related" to the matters in this application.

18. Quite clearly, the Original Retainer did not and would not have produced any confidential information (or information of any sort) related to Gotham, or the specific nature of its collective agreement with the Formwork Council or its relations with Local 183. Gotham was simply one of hundreds of employers bound to that collective agreement. Local 183 acknowledges that there was no information about Gotham specifically that was given to Shell Lawyers. Rather, Local 183 alleges that Mr. Comartin received confidential information about its manner of operating, the manner in which it administers and enforces collective agreements in general, and the Formwork Agreement in particular, and the nature and wording of the Formwork Agreement.

19. Some of the cases relied on by the CCWU deal with questions of whether there is a specific factual nexus between the original matter on which a lawyer acted and the issues in the subsequent case from which it is sought to remove the lawyer. There is clearly no such connection here, as the relationship between Local 183 and Gotham played no part in the hearings before Mr. Keller. However, the case law does not require a specific point-by-point correspondence between the facts relevant to the Original Retainer and the facts relevant to the second proceeding. It is entirely possible that within a general retainer, specific information or types of information may be known to the lawyer which have a relevance to the issues raised by the later proceeding.

20. In this case, I conclude that there is no possibility that any confidential information that is relevant to this application was given to Mr. Comartin during the Original Retainer. The factual details of the cases relied on before counsel are instructive.

21. In *MacDonald Estate v. Martin*, there was a direct sort of correspondence. In that case, a lawyer was an associate of a firm acting for the defendant in a civil action in which the plaintiff was seeking an accounting from the defendant. She was involved in discoveries in that action. She worked on the case directly. That lawyer then left the defendant's firm and went to work for the firm acting for the plaintiff. Because that firm took no steps to ensure that she was "screened" from work on behalf of the plaintiff (assuming that such a screen would be effective, a point the court did not decide), the possibility of a conflict arising from the presence of confidential information existed and the Court removed the firm acting for the plaintiff.

22. In *Canada Trust Co. Mortgage Company v. Corkum* [1991] NSJ 280 (1991) 46 CPC (2d) 90, the lawyer acted for the defendant for many years. He acted for the defendant in his personal capacity, in his corporate affairs and in many commercial dealings and litigation, including the financing of his various companies. In one instance, he advised the defendant about his personal responsibility during the receivership of one of his corporations. On a personal level, he acted for him in drafting a will and during a divorce. In 1998, bankruptcy occurred with respect to some of his companies. The lawyer then commenced to act for a creditor, Canada Trust. Canada Trust sought to challenge the dealings among the corporations and with the defendant personally. There was also an

issue about the effectiveness and enforceability of documents that he had executed and on which he was advised by the lawyer. Canada Trust also alleged fraud and conversion against Corkum. The Court concluded:

> When one is dealing in litigation, an understanding of one's opponent, his strengths and weaknesses is vitally important.
>
> Here the plaintiff's law firm acted extensively for Eric J. Corkum in his personal, financial and business endeavours over such a prolonged period that, in my view, a reasonably informed person would not be satisfied that no use of confidential information would occur.
>
> A reasonably informed person knowing of the extent of the plaintiff's law firm's confidential knowledge of the personal, financial and business affairs of Eric J. Corkum, which would have been imparted by him over a lengthy period of time on such a variety of matters, all in confidence, that sooner or later such knowledge would surface as a detriment to Eric J. Corkum. Any client, including Eric J. Corkum, must be secure in the knowledge that revelations made in confidence cannot, without waiver, come back to haunt him inadvertently or otherwise.

23. In *Chapters Inc. v. Davies, Ward and Beck LLP* [2001] O.J. No. 206, 52 O.R. (3rd) 566, the law firm acted for Smith Books and Coles when they amalgamated to form a single bookstore chain, providing counsel and advice with respect to competition law issues. When the two merged, they became the largest and indeed, the dominant, bookseller in Canada. The law firm succeeded in persuading the Competition Bureau to approve the transaction. The two merged booksellers then carried on as Chapters Inc. The law firm acted for them for a seven-month period to achieve this result and did not act for them further. Five years later, the firm acted for Indigo Inc. in a takeover battle with Chapters. Chapters objected and sought to have the firm removed from the record. Despite the passage of five years, Justice Farley and the Ontario Court of Appeal found there was a conflict. The Court of Appeal decision is worth quoting extensively:

> 32. It is clear that while engaged on the Chapters retainer Davies acquired a very significant amount of confidential information including information relating to the nature of the retail book market, the nature of the business of Smith and Coles, the strategic plans for Chapters, projected efficiency gains for up to ten years in the future, existing contractual arrangements including long-term leases some of which remain in effect, and prospective trade terms with suppliers. All this was necessary for Davies to receive and, with the help of its client, to fully understand in order to successfully perform its retainer relating to competition issues. The depth of the review conducted by the Competition Bureau made this essential.
>
> 33. While a number of the documents received by Davies have since been made public by Chapters, many have not. Nor does it appear that the confidential discussions between Chapters and Davies in which information was passed have been publicly revealed.
>
> 34. The core of the Davies position is that the nature of the industry and the nature of Chapters' business have both changed so dramatically since 1995 that the confidential information received in the earlier retainer cannot possibly be relevant to the current matter.

> 35. I disagree. While there is no doubt that there have been significant changes, this is still about the retail book business. Even that portion of the information which may have been displaced by more current information would provide a historical basis for the more recent data and would possibly be useful for deriving trends relevant to the current situation. More fundamentally, just as Coles and Smith together dominated the retail book market in 1995 so Chapters and Indigo together would do just that today. The issues to be addressed today by the Competition Bureau will be the same as they were then and will require that the same kind of information be addressed. Only five and one-half years separate the Chapters retainer from the integral involvement of Mr. Goldman and his colleague in the Trilogy retainer. Moreover, it must be remembered that the latter retainer is extremely broad, requiring Davies to give advice on the full range of issues connected with the hostile takeover bid and Chapters' response to it.
>
> 36. *Given the nature and detail of the confidential information received, the limited time that has passed and the breadth of the current retainer, it is likely that at least some of that information could be relevant to the current matter.* It is likely to be a part of the factual context directly informing Davies' advice to Trilogy [i.e. Indigo] and Davies' actions on Trilogy's behalf. Even if the information acquired earlier may not be publicly filed or disclosed in the course of the current matter, it will be relevant if it assists the lawyers to advance the cause of the new client against the old client.
>
> 37. *Looked at in this way, Chapters has demonstrated that it is reasonably possible that Davies received confidential information pursuant to the Chapters retainer that could be relevant to the Trilogy matter. I think therefore that Farley J. was correct in finding that Chapters has met the "sufficiently related" test.*

That is, the information acquired during the course of the Original Retainer was such that it was *possible* that the law firm would have information that might become relevant during the course of the proceedings.

24. Counsel also referred to the litigation involving Shell Lawyers and Local 183 after the trusteeship was imposed, see *Labourers' International Union of North America v. Shell* [2007] O. J. No. 471 and *Labourers' International Union of North America, Local 183 v. Ontario (Labour Relations Board)* [2007] OLRB Rep. Mar/April 466; [2007] O.J. No. 1048. As noted above, Mr. Comartin had no personal connection with the conduct of Shell Lawyers in that affair. In any event, that case involved a finding by the Divisional Court that the later litigation seeking to resist and to attack the trusteeship was part and parcel of the same dispute between Local 183 and LIUNA in which Mr. Shell acted for Local 183. The court found that he could not switch sides in the middle of the case and commence to act against Local 183, regardless of the fact that his instructing clients had done just that.

Application of the Law to the Facts of this Application

25. Despite the attempt by Local 183 to characterize the issues arising from this case as somehow raising large and general questions about the general administration of Local 183 or its manner of enforcing and policing collective agreements, I conclude that there is no possibility that any confidential information Mr. Comartin might have acquired during the course of the Original Retainer could be relevant or connected in any way with the specific issues raised in this case.

26. With respect to the Formwork Agreement generally, there is no fact in issue in this application about the validity of that collective agreement, the relationship between the Form Work Association and the Formwork Council, the manner in which it operates, or the meaning of any particular term in the Agreement. Further, there is no issue generally with respect to whether or not an employer may become bound to the entire collective agreement by virtue of executing a one-page "short-form agreement", nor is there any issue about the form or wording of this particular short-form agreement, whether or not it is a standard one used by Local 183.

27. The Formwork Council simply pleads that the collective agreement exists. Either it exists or it does not. The fact of the existence of the collective agreement, and perhaps the scope of the Recognition Clause (which itself is hardly a confidential document) is all that is relevant in this proceeding.

28. Mr. Keresztesi states that the proceedings before CIHO meant that Mr. Comartin became familiar with the operation and administration of Local 183's collective agreements. Specifically:

> 8. The proceedings before CIHO Keller involved many and diverse aspects of the operation or administration of Local 183, including the enforcement, operation and/or administration of the various collective agreements with or binding upon Local 183. As noted in Mr. Keller's decision (at p. 3), the General Executive Board Counsel - Canada ("the GEBCC") issued a report setting out 16 "Findings" or charges of alleged constitutional breaches against Local 183 and the executive summary of these Findings is attached to the Keller decision as Appendix A. The GEBCC's Findings 1, 2 and 3 generally bring into question the administration and operation of all Local 183's many collective agreements while certain Findings relate to specific collective agreements permitting piecework (Findings 4-6, incl.) or a particular collective agreement (the Metropolitan Toronto Apartment Builders collective agreement at Finding 9), while other Findings impugn, for example, donations (Finding 7), the propriety of certain expenditures (Finding 8), etc. In my opinion, the Shell Lawyers firm, including Mr. Comartin, would have had to familiarize themselves with many aspects of Local 183's administration or operation, including all of Local 183's collective agreements, such as the Formwork Agreement, to prepare for the proceedings before Mr. Keller and of course to present Local 183's Bill 80 case before this Board.
>
> 9. Mr. Keller made specific rulings on Findings 1, 2 and 3 which are relevant to this application, namely, with respect to the administration or enforcement of the Formwork Agreement and in that regard had before him the testimony of Orlando Lio and Victor Ferreira. Mr. Lio was a Local 183 steward working for a residential high-rise concrete forming contractor (Premform) at a Toronto-area job and Mr. Ferreira was a business representative of Local 183 involved in the administration and enforcement of the Formwork Agreement. The evidence in question related to these particular Findings of the GEBCC that Local 183 did not enforce its collective agreement and these witnesses testified about the enforcement of the Formwork Agreement since certain of the workers at the project were not union members and/or cleared to the job and/or paid the rates of pay etc. under the Formwork Agreement. The portion of the transcript of Mr. Lio's evidence is attached at Tab 5 of Document Book no. 2 and the portion of the transcript of Mr. Ferreira's evidence is attached at Tab "A" hereto.

29. Findings 1, 2 (along with Finding 5), and 3 related to the denial of membership for undocumented workers, the inadequate allocation of benefit entitlements to pieceworkers, and the denial of benefits to undocumented workers respectively. There is nothing in the intervention that relates to any of those issues. To the extent that the findings of the CIHO were that Local 183 failed to enforce its collective agreements, those findings and the evidence supporting them, have no bearing on this case at all. That finding makes it no more or less likely that Local 183 abandoned any bargaining rights with Gotham; that issue will be decided on the basis of the evidence in this case.

30. Findings 7, 8 and 9 referred to in Mr. Keresztesi's statement have nothing at all to do with the administration or enforcement of the Formwork Agreement, or (in the case of Findings 7 and 8) any collective agreement at all.

31. In contrast, the pleadings here relate to specific allegations of facts involving identifiable people who did or did not make specific statements at particular times. Durocast Structural Inc. pleads in its Response:

> 9. During the summer of 2007, and after the incorporation of Durocast, A. Cipriani contacted Mr. Rocco Lotitto ("Lotitto") a representative of the Applicant, to inquire about obtaining bargaining rights with the Applicant because Durocast required workers. A. Cipriani also advised Lotitto that Durocast wanted to sign with the Applicant because it was going to engage in the concrete forming business. Lotitto advised A. Cipriani that the Applicant did not have any workers to supply to Durocast and that it would not sign with Durocast because of this fact.
>
> 10. Therefore, contrary to the Applicant's unsubstantiated assertions, Durocast was not created for the sole purpose of avoiding bargaining rights with the Applicant and demands all particulars with respect to this allegation.
>
> 11. Since the Applicant refused to sign with the Responding Party, in or around August 2007 A. Cipriani approached Victor Ferreira ("Ferreira"), a representative with the Canadian Construction Workers Union ("CCWU"), to inquire about obtaining workers from the CCWU. Ferreira agreed to supply Durocast with workers. On or around October 25, 2007, Durocast and CCWU executed a voluntary recognition agreement covering Residential Highrise Concrete Forming.

The CCWU has pleaded:

> 14. The Applicant was aware that Durocast was engaged in concrete forming work as early as October 2007, when Rocco Lotito ("Lotito"), an officer of Labourers International Union of North America Local 183 ("Local 183"), visited the Port Perry project worksite.
>
> 15. On or about January 2008, Lotito visited the Port Perry project again and spoke to the superintendent, Joe Di Pasquale, informing him that Local 183 would not stand for any attempts by Anthony Cipriani and Durocast to undertake concrete forming work in Toronto.
>
> 16. On or about March 12, 2008, two Local 183 organizers, Tony Lucas and Carlo Pinheiro, visited the Port Perry project and made false and derogatory statements about the CCWU to Durocast's employees.

> 17. In April 2008, Rocco Lotito visited the Toronto project and observed Durocast employees supplied by the CCWU working there.
>
> .....
>
> 32. In the further alternative, even if there was a "sale of a business" or Gotham and Durocast are "related employers," the Board should not grant the Applicant relief, because the Applicant has abandoned its bargaining rights.
>
> 33. The Applicant was aware as early as October 2007 that Durocast had begun operations but made no attempt to enforce its bargaining rights and administer its collective agreement until April 2008. There is no reasonable justification for this delay. A trade union is not required to wait until actual erosion of its bargaining rights has occurred before it is entitled to have its rights protected by a common employer declaration.

32. This has nothing to do with the general enforcement of collective agreements by Local 183. Either the events happened or they did not. Of course, Local 183 does not assert that Mr. Comartin has any knowledge of those particular facts.

33. The Formwork Council has also provided the Board with copies of a portion of the transcript of the CIHO hearings that relate to several allegations that Local 183 knowingly permitted persons without a referral slip to work on jobs operated by other employers bound to the Formwork Agreement where they ought not to have been permitted to do so. It is not something that arises in this case at all.

34. In addition, Mr. Keresztesi states at paragraph 13 that:

> "Durocast contests the validity of the pick-up or voluntary collective agreement between Local 183 and Gotham."

35. What its pleadings say are simply:

> 4. The Responding Party puts the Applicant to the strict proof that it had bargaining rights with Gotham and demands all particulars and documents with respect to its alleged bargaining rights with Gotham.

36. It is perhaps premature to describe this as pro-forma pleadings, but it does not raise any issue as to the validity or efficacy of any general practice by Local 183. It simply denies, at least for the purposes of a pleading, that a collective agreement of any sort exists. Durocast asserts that it is independent from Gotham and is under different direction and control. Hence it is unlikely to make admissions on behalf of Gotham of which it has, or claims to have, no knowledge. While the Formwork Council might well demand particulars (they have not done so to date), there is nothing in the pleadings that would suggest that there is anything beyond the existence of the relationship between the Formwork Council and Gotham that is in issue.

37. Counsel also argues that the issue of abandonment of bargaining rights might raise a conflict. He argues that Mr. Comartin would have a detailed knowledge of Local 183's policies and how it enforces its collective agreements and that this would reflect on the issue of an abandonment of bargaining rights in this case. On the simplest level, the abandonment argument arises from the

facts pleaded above, that is, specific acts and specific events that took place at particular times and places. Either they occurred or they did not occur.

38. Even if the allegation of abandonment is somehow broader than that, that assertion (assuming the Board would allow a party to lead evidence on unpleaded factual matters) is of no assistance to Local 183 or the Formwork Council. Abandonment is a finding of fact made by the Board, not a subjective issue for Local 183. What Local 183 does typically in the enforcement of its collective agreements is irrelevant to that determination. The evidence will disclose that Local 183 did or failed to do certain things. There may be good reason for those actions or that inaction, or there may not be. If the Board finds the objective facts about what Local 183 did or did not do constitute abandonment, then that will be the decision it renders on the facts before it, not based on some standard set internally by Local 183.

39. I conclude therefore that there is no possibility that the factual and legal issues of this case give rise to any possibility that confidential information that Mr. Comartin obtained during the Original Retainer would be in any way connected to or relevant to this application.

Duty of Loyalty

40. Beyond the issue of the possession of confidential information, there is also the issue of the duty of loyalty that a lawyer owes to a former client. The law is quite clear that a lawyer is in a type of fiduciary relationship to his or her client. Even after the retainer expires, the lawyer is under a general "duty of loyalty and good faith and a duty not to act against the interests of the client" (*Drabinsky v. KPMG* (1998) 41 O.R. (3rd) 565 (General Division) at 567). In *R. v. Neil*, [2002] 3 S.C.R. 631, a case that dealt with a duty of loyalty to an existing client, the Supreme Court of Canada put it this way:

> 17. While the Court is most often preoccupied with uses and abuses of confidential information in cases where it is sought to disqualify a lawyer from further acting in a matter, as in *MacDonald Estate*, *supra*, the duty of loyalty to current clients includes a much broader principle of avoidance of conflicts of interest, in which confidential information may or may not play a role: …
>
> 18. In *Drabinsky v. KPMG* (1998), 41 O.R. (3d) 565 (Gen. Div.), where the plaintiff sought an injunction restraining the accounting firm KPMG (of which the plaintiff was a client) from further investigating the financial records of a company of which the plaintiff was a senior officer, Ground J., grouping together lawyers and accountants, said, at p. 567:
>
>> I am of the view that the fiduciary relationship between the client and the professional advisor, either a lawyer or an accountant, imposes duties on the fiduciary beyond the duty not to disclose confidential information. It includes a duty of loyalty and good faith and a duty not to act against the interests of the client.
>
> [page 645]
>
> Some members of the accounting profession assert the efficacy of "Chinese walls" in accounting practices even with respect to the affairs of *current* clients. Whether this belief is justified in the absence of informed consent from the clients concerned is an issue for another day. Insofar as the *legal* profession is concerned, Ground J's view of the duty of loyalty to current clients is unassailable.

41. In an article in Proulx and Layton, *Ethics and Canadian Criminal Law* (Irwin Law: 2001), the learned author puts it this way:

> The above examples of harm to a former client involve the spectre of confidential information being misused. However, altogether apart from this possibility, counsel owes a broader duty of loyalty to a former client. As most rules of professional conduct suggest, a former client has a legitimate claim to expect counsel's loyalty to persist *with respect to the subject matter of a retainer*, even after the client-lawyer relationship has ended and even if there is little or no possibility that confidential information can be misused. In such circumstances, courts are quite prepared to find that a reasonable member of the public would hold the integrity of the justice system in considerably less esteem if, despite the protests of the former client, the original lawyer was permitted to launch an all-out attack. [emphasis added]

(See also G. MacKenzie, *Lawyers and Ethics*: Professional Responsibility and Discipline (Carswell: 2008) at pages 5-19 to 5-20.)

42. On the other hand, the duty of loyalty to a former client is not absolute and unlimited. It relates to the scope of the former retainer. If it were otherwise, then a lawyer would never be able to act against a former client in any matter, which is clearly not the case. Indeed, the case law where the issues arise are all concerned with solicitors (or accountants) who are alleged to be in breach of a duty of loyalty to a former client, all arise out of a conflict between the subject matter of the original retainer and the lawyer's current activity.

43. In *Drabinsky v. KPMG, supra*, the Court was dealing with an accounting firm, rather than lawyers, but the Court treated the two professions as equivalent for this purpose. KPMG had acted for Livent Inc., and perhaps for Mr. Drabinsky personally. At some point, Livent ran into difficulties and the shareholders lost control of the firm. A different set of partners at KPMG were retained to conduct an investigation into the amount, nature, classification and causes of irregularities in Livent's financial statements. It was also to determine whether the irregularities were the result of theft, financial statement manipulation or other fraudulent activity and to identify where the responsibility for the irregularity lies. Justice Ground of the General Division granted an interim injunction against KPMG from acting further in the matter and, in a passage partially quoted above, said at page 567:

> I am of the view that the fiduciary relationship between the client and the professional advisor, either a lawyer or an accountant, imposes duties on the fiduciary beyond the duty not to disclose confidential information. It includes a duty of loyalty and good faith and a duty not to act against the interests of the client. *I am further of the view that the scope of these duties is not defined by the nature of the original retainer between the fiduciary and the client but, rather, by the nature of the activities in which the fiduciary proposes to engage in the face of such fiduciary duties. ...* [emphasis added]

There is no real contradiction between these comments and those in Proulx and Layton's text quoted at paragraph 41 above. It is only a matter of the place from which the observer starts. In either case, what engages the duty of loyalty to the extent of preventing a lawyer from acting is the confluence or overlap of the legal and factual issues of the two retainers that are otherwise separate in time.

44. In *Chiefs of Ontario v. Ontario*, [2003] O.J. 580, 63 O.R. (3rd) 335, a law firm acted as general counsel for the Mnjikaming First Nation ("MFN") in connection with its interests in Casino

Rama. During the course of the retainer, it received confidential information about the client's earlier negotiations for an agreement to share Casino revenues and to operate the Casino. The same firm accepted a retainer from the Chiefs of Ontario to bring an action with respect to the position by the Province of a 20% "win tax" on gross revenues. It obtained the approval of MFN when it commenced the action, as it appeared that the interests of MFN were not engaged by the action. Sometime after commencing the action, the law firm, instructed by the Chiefs of Ontario, amended the pleadings to allege that MFN had engaged in a breach of fiduciary duty, deception and bribe-taking in respect to the operation of the Casino. On a motion by MFN to have the law firm removed as counsel for the Chiefs of Ontario in the action, Justice Campbell said:

> 112. The public interest in the administration of justice requires the confidence of every litigant that their legal advisers will not later attack their honour in matters closely related to their confidential retainers.
>
> 113. Even a valid consent to act against a former client will not bar removal if the public interest in the administration of justice creates a legitimate concern about the appearance of impropriety arising from a conflict.
>
> ...
>
> 122. The basic principle from *MacDonald Estate v. Martin* is that a law firm cannot breach its dual obligation of confidentiality and loyalty to its former client.
>
> 123. The breach of loyalty and good faith is obvious from Blakes' attack on its former client. Blake alleges that MFN is a "wolf in sheep's clothing" guilty of breach of fiduciary duty, deception and taking bribes from the government in order to betray its First Nations allies for its own financial benefit.
>
> ...
>
> 146. There are some things that a law firm simply cannot do. A law firm cannot act for a client under a million dollar, five-year confidential retainer as general counsel and then, without explicit consent, attack the client for alleged breach of fiduciary duty, deception and bribe-taking in respect of closely related matters.

Although Justice Campbell made repeated references to the receipt of confidential information by the law firm, the case is determined only on the basis of a finding of a breach of loyalty to a former client.

45. In *Stewart v. Canadian Broadcasting Corporation* [1997] O.J. 2271, 150 D.L.R. (4th) (24), a former client successfully sued his lawyer and the CBC for broadcasting a television show during which the lawyer spoke about the trial and appeal of his former client. The trial was in 1978 and the television show in 1991. The show dealt with information that was all publicly available, and was related exclusively to a public trial and the appeal. It included (since this was television) some dramatization of the events. Despite the fact that all of the facts discussed were publicly available, Justice MacDonald found at page 316 and 320:

> 316. ... It was when he acted as Mr. Stewart's counsel that a fiduciary duty attached to Mr. Greenspan in respect of Mr. Stewart and his case. That duty was alive but inoperative through the years that Mr. Greenspan and Mr. Stewart were independent of each other. Mr. Greenspan brought himself within the sphere of that duty when, in 1991, he chose to involve himself again in the public aspects of Mr. Stewart's case.

> Involving himself again in the subject matter of his concluded retainer triggered the fiduciary obligation of loyalty. Mr. Greenspan's duty was to be loyal to Mr. Stewart to the extent of firstly, not taking advantage of him, and the information and issues which had been the subject of his professional services and secondly, to the extent of not undoing the benefits and protections provided by those professional services. …
>
> 320. For the above reasons, Mr. Greenspan breached his fiduciary duty of loyalty to Mr. Stewart in the following ways:
>
> - -He favoured his financial interests over the plaintiff's interests…
>
> - -He put his own self promotion before the plaintiff's interests…
>
> - -By the way he publicized his former client and his former client's case in 1991, he undercut the benefits and protections he had provided as counsel, and therefore, increased the adverse public effect on the plaintiff of his crime, trial and sentencing, …

46. In a decision of the Ontario Securities Commission, noted with approval by the Supreme Court of Canada in *Strother v. 3464920 Canada Inc.* [2007] 2 S.C.R. 177 and [2007] S.C.J. No. 24, the Commission dealt with an application for review of a hearing panel disqualifying a lawyer from acting in a matter before the Market Regulation Services Inc. The decision is reported at *Credit Suisse First Boston Canada Inc.* (2004) 28 O.S.C.B. 1571, 2 B.L.R. (4th) 109. The law firm had acted for the Toronto Stock Exchange (TSE) with respect to market regulation and the ultimate creation of the regulating body, Market Regulation Services Inc. It provided legal and strategic advice to the TSE on how best to structure and deliver market regulation services, the incorporation of a new entity to deliver market regulation services and the manner in which that entity (ultimately the Market Regulation Services Inc. ("MRS")) ought to be structured. During the course of argument, the law firm pointed out that its advice was accepted only in part and the draft governance proposal it had prepared for TSE was not used at all in the structuring of MRS. Its retainer came to the end after the MRS began to operate.

47. In 2004, MRS commenced an investigation into a bank, Credit Suisse. The same law firm acted for the bank. Its defence included an attack on the jurisdiction and capacity of MRS to proceed at all. It also alleged that due to the close and overlapping relationship between the TSE and the MRS, MRS was biased in favour of the TSE's interests. Finally, it alleged a failure of the TSE to effectively delegate regulatory authority to MRS. The hearing panel removed the law firm from acting for the bank in the case. Review was sought in front of the Ontario Securities Commission. The Commission dealt with the issue of a duty of loyalty to a former client at pages 24-27 and concluded at paragraph 136:

> 136. A lawyer acting for a new client against a former client does not necessarily offend a duty of loyalty. In fact, in this case, RS did not object to Stikeman Elliott's retainer with CSFB for the five months prior to the time that the impugned Part V allegations were raised. The Hearing Panel did not find that Stikeman Elliott was prevented from acting against RS in general. Rather, it found that Stikeman Elliott could not, acting for CSFB, attack the very legal advice it had provided to the TSE and, by extension, RS, in the Retainer. We agree with the conclusions of the Hearing Panel in this regard.

48. Finally, in *Strother v. 3464920 Canada Inc.*, *supra*, the Supreme Court of Canada dealt with the duty of loyalty to a client. That case was concerned with the duty to a current client (although the Courts below had treated it as involving a duty, or lack thereof, to a former client). However, the Court did affirm the existence of a duty of loyalty to a former client and cited with approval the cases referred to above and reaffirmed its own *obiter* to that effect in *MacDonald Estate v. Martin*, *supra*.

49. The case law then locates the duty of loyalty in the Original Retainer. However, that duty of loyalty is only engaged if the lawyer acts against the former client in a later action with respect to matters that relate to the factual and legal issues that arose in the Original Retainer. There may be no confidential information that was given to the lawyer during the course of the Original Retainer, but if the lawyer is proposing to attack or impugn the very matters on which he or she provided advice and counsel, then that act would constitute a breach of the duty of loyalty. This is particularly so when the lawyer was retained as general counsel, rather than for a single or specific file, but only because the range of matters that the lawyer did act on, or might have acted on, would be greater.

50. The question in this case is whether the facts relevant to this case would require Mr. Comartin to revisit or deal with any of the issues in respect of which he acted for Local 183 during the trusteeship application. I conclude they do not. The original collective agreement with Gotham was executed before the commencement of Shell Lawyers' retainer. It was not relevant to or mentioned in any way in the course of litigation with LIUNA. Any attack on that agreement (if Durocast is in fact making such an attack) does not arise out of any alleged systematic manner of dealing with such collective agreements. If there is an attack on the efficacy of a short-form agreement, that issue is not to be found in any of the information put before me in this case about what transpired before Mr. Keller. Indeed, had it been before him, I cannot imagine that either Local 183 or LIUNA would have disputed the efficacy of that type of document.

51. The issues of abandonment, and the actions (or inaction) of Mr. Lotito are specific to Durocast. They are not alleged to be typical of the manner in which Local 183 operates, nor would it be particularly relevant if they were. There is nothing pleaded that would cause the Board to hear any evidence about the ordinary and usual manner in which Local 183 administers and applies its collective agreements generally or the Formwork Association Collective Agreement in particular. The issues related to the "administration of the Formwork Agreement" described in the portions of the transcript of the hearing before Mr. Keller and as discussed by him in his decision are entirely different from the issues in this application.

52. Finally, it is worth looking at the rationale behind this rule. Obviously, it is first and foremost to ensure that persons who are engaged with the legal system have the confidence in the undivided loyalty of their lawyers. As the Supreme Court of Canada said in *R. v. Neil* [2002], *supra*, at paragraph 12:

> Unless a litigant is assured of the undivided loyalty of the lawyer, neither the public nor the litigant will have the confidence that the legal system, which may appear to them to be a hostile and hideously complicated environment, is a reliable and trustworthy means of resolving their disputes and controversies. ...

With respect to the duty to a former client, it is perhaps equally true that such trust would be eroded if the client had to be concerned about whether or not the lawyer would talk about his or her case in a television show years later, or was likely to attack him or her in litigation about the events occurring during the time when the lawyer was acting for the client on the very matters that were the subject of the later litigation. That would be true whether the client did or did not accept the lawyer's advice.

53. Gavin MacKenzie, in his article cited above, suggests the following rationale at pages 5-20.1 to 5-20.2:

> There are at least two reasons that lawyers should be enjoined from acting against former clients in related matters even if there is no risk of confidential information being misused. The first is the danger that in the original representation the lawyer might consciously or subconsciously fail to protect one client's interest adequately due to a desire to leave the door open to future representations of the other, perhaps more affluent, client. The second reason focuses not on the former client but the surviving or succeeding client. The danger is that the client for whom the lawyer acts in the second matter may receive a less vigorous representation than that to which all clients are entitled because the lawyer may (again, consciously or subconsciously) "go easy" on the former client. Most lawyers, for example, are likely to find it more difficult to cross-examine aggressively a former client than a stranger.

In this case, counsel for Local 183 and the Formwork Council agreed that a well-informed and reasonable member of the public would be unlikely to see any danger of either of these conditions applying to Mr. Comartin in this case.

54. Accordingly, I conclude that while Mr. Comartin does owe Local 183 a duty of loyalty arising out of the former retainer of Shell Lawyers by Local 183, that duty is not engaged by the factual and legal issues that exist or could exist in this case.

55. For these reasons, the motion to disqualify Mr. Comartin from acting for the CCWU in this case is dismissed.

0593-08-R The International Union of Painters and Allied Trades, Local Union 1891, Applicant v. **Hi-Tek Dev Inc.**, Responding Party

Certification – Construction Industry – Evidence – Practice and Procedure – A key issue in dispute was whether G was at work on the application filing date – Although the employer's written submissions after the Regional Certification Meeting and its opening statement raised this issue, counsel failed to put to any of the applicant's five witnesses, including G, that it would be calling a witness to testify that G was not at work on the application filing date – When the employer's witness began testifying that G was not at work on the application filing date, union counsel raised the rule in *Browne v Dunn*, asking the Board to exclude the evidence – Although the Board accepted that the responding party had not abandoned its position and that the failure to cross-examine was due to inadvertence, the Board did not find the circumstances supported the exercise of discretion to relieve against the application of the rule: the applicant did not contribute to the situation; the applicant would be significantly prejudiced; the calling of reply evidence (as a way to remedy the situation) would unnecessarily lengthen and complicate the proceeding; and the use of teleconference or video

conference would not work with the witnesses that may have to be recalled – Accordingly, the Board sustained the applicant's motion and would not consider the evidence – Matter continues

BEFORE: *Lee Shouldice*, Vice-Chair.

APPEARANCES: *Elizabeth Mitchell* and *Wayne Wright* for the applicant; *Robert Atkinson* and *Sam Halbouni* for the responding party.

DECISION OF THE BOARD: December 17, 2008

1. This is an application for certification in the construction industry which the applicant elected to have dealt with pursuant to the provisions of section 128.1 of the *Labour Relations Act, 1995*, S.O. 1995, c. 1, as amended (the "Act"). The application filing date was Saturday, May 17, 2008.

2. This decision deals with an evidentiary issue that arose during the examination-in-chief of Mr. Lech ("Les") Witkowski on November 28, 2008.

3. Broadly stated, the key issue in dispute in this proceeding is the employee status of five individuals. The applicant asserts that there were five individuals employed by the responding party at work on the application filing date. The responding party denies that the five individuals identified by the applicant were its employees. It claims instead that four of the five individuals were, in fact, employed by the fifth individual, Mr. Dean Gayle. The responding party also asserts that Mr. Gayle was not at work on the application filing date.

4. This proceeding initially came on for hearing on August 6, 2008. The applicant proceeded first to call evidence regarding the five individuals it asserts should be on the Schedule "A" list of employees. On the first day of hearing I heard the evidence of Mr. Gayle. Mr. Gayle was examined by counsel for the applicant, cross-examined by counsel for the responding party, and briefly re-examined by counsel for the applicant. At that point, this proceeding was adjourned and subsequently scheduled for two further days of hearing on November 27 and November 28, 2008. During those two days of hearing, I heard the evidence of Jeff White, Tom Bennet and Brandon Little, all of whom testified on behalf of the applicant. The applicant then closed its case. Counsel for the responding party then called Mr. Witkowski as its first witness. During Mr. Witkowski's examination-in-chief, the evidentiary issue in dispute arose.

5. The evidentiary issue relates to the admissibility of certain evidence called by the responding party, having regard to the rule in *Browne v. Dunn*, (1893) 6 R. 67 (H.L).

6. The circumstances surrounding the calling of the evidence are as follows. The employee status of the five individuals sought to be added to the Schedule "A" list of employees is the key issue in dispute in this proceeding. The responding party has also raised as an issue whether Mr. Gayle was at work on the application filing date. That issue was clearly raised in the responding party's written submissions to the Board after the Regional Certification Meeting, and was specifically referred to during the opening statement made by counsel for the responding party at the outset of the hearing.

7. During Mr. Gayle's examination-in-chief, Mr. Gayle was asked a number of questions regarding his whereabouts on the application filing date. He testified that he and Mr. Bennet went to

the Gold's Gym site in London, Ontario, at approximately 9:30 a.m. that morning, and worked until approximately mid-day. He testified regarding the work he performed that day and what he observed at the site. He was not cross-examined on any of this evidence by counsel for the responding party.

8. Subsequently, the applicant called Mr. White, Mr. Bennet and Mr. Little to testify on its behalf. Mr. White, Mr. Bennet and Mr. Little each testified that he observed Mr. Gayle at the Gold's Gym site on the application filing date. Mr. White was not cross-examined on his observations regarding Mr. Gayle. Mr. Bennet was cross-examined regarding what work he performed on the application filing date, but no specific reference to Mr. Gayle was made. Mr. Little, the applicant's final witness, was asked in cross-examination about his observations regarding Mr. Gayle's attendance at the site on the application filing date. It was not put to any of the above-referenced witnesses that the responding party would be calling testimony through one or more witnesses that Mr. Gayle was not at work on the application filing date.

9. During the course of Mr. Witkowski's examination-in-chief, Mr. Witkowski was asked whether he was in attendance at the Gold's Gym site on the application filing date. He testified that he was. He was then asked by counsel for the responding party whether Mr. Gayle performed work on that day. Mr. Witkowski responded in the negative, which response elicited an immediate objection from counsel for the applicant. She asserted that Mr. Witkowski's potential evidence was never put to Mr. Gayle during his cross-examination, and therefore took the position that the evidence should not be considered by the Board, having regard to the rule in *Browne v. Dunn*. Counsel for the responding party stated that he had put this evidence to Mr. Gayle during cross-examination. After a brief recess for the parties to review their notes, counsel for the responding party acknowledged that he had not put Mr. Witkowski's evidence to Mr. Gayle for comment during Mr. Gayle's cross-examination. I then heard argument on the question of whether I should permit this evidence to stand. At that time, I indicated that having regard to the time of day, the significance of the issue to the proceeding, and the need for me to more carefully review my notes, I would reserve on the issue and provide the parties with a decision on the question well in advance of the next hearing dates.

10. At the request of counsel for the responding party, written submissions have been filed with the Board by both the responding party and the applicant regarding this issue. As agreed, each counsel has also filed submissions replying to opposing counsel's first submission. I have reviewed all of those submissions and the materials filed in conjunction with those submissions. The written submissions were extremely helpful and I thank both counsel for same. I set out below in an extremely abbreviated fashion the main assertions made by the parties in support of their positions.

11. Put briefly, counsel for the applicant asserts that I should apply the well-known principle established in *Browne v. Dunn* and exclude the evidence in question. She asserts that the responding party for all intents and purposes abandoned its position respecting Mr. Gayle during the course of evidence, and that as a result the applicant saw no need to call any further evidence with respect to Mr. Gayle's attendance at work on the application filing date. She states that to permit the evidence in question to be called would cause prejudice to the applicant and its four witnesses that is not simply cured by calling them (and perhaps other witnesses) in reply, because doing so would effectively mean starting the hearing over again with respect to this issue. Counsel questions why four out-of-town witnesses and the applicant ought to be put to the cost and inconvenience of further hearing dates because the responding party did not comply with the rule in *Browne v. Dunn*. Counsel relies upon the decisions of the Board in *John Boddy Developments Ltd.*, [2006] OLRB Rep. May/June 360 (May 31, 2006), *Mason Homes Ltd.*, [1999] OLRD No. 3430, *Pre-Eng Contracting*

Ltd., [2008] OLRB Rep. March/April 284 (Apr. 8, 2008), *John Clark*, [1991] OLRB Rep. May 598, and *Ontario Hydro*, [1996] OLRD No. 2433.

12. Counsel for the responding party asserts that the rule in *Browne v. Dunn* does not apply in the circumstances, because it is clear from the decision in that case itself (and a number of labour arbitration cases that have applied it) that where it is obvious that the evidence of a witness will be contradicted by the party cross-examining, it is not necessary to put the fact that the witnesses' position will be contradicted to the witness. Counsel asserts that the questions that would have been put to the four witnesses are "I put it to you that Mr. Gayle was not at work on the Saturday" and "I put it to you that Mr. Witkowski will testify that Mr. Gayle was not at work on that day". It is asserted that Mr. Gayle and the other witnesses would have merely denied these propositions, so no value would have been added by putting the responding party's position to those witnesses. Because the responding party's position was so clear, counsel for the responding party states that there is no basis for the applicant to assert that there was any surprise or prejudice to the applicant when Mr. Witkowski was asked whether Mr. Gayle had been at work on the application filing date. The responding party denies that it at any time abandoned its position regarding Mr. Gayle. It states that the applicant still must prove its case, and that if the applicant determined not to call certain witnesses on the basis of its cross-examination of the applicant's witnesses, the applicant must live with that decision. Counsel cites Brown & Beatty, *Canadian Labour Arbitration* (Fourth Edition, Canada Law Book), Gorsky, Upsrich, Brandt and Wilson, *Evidence and Procedure in Canadian Labour Arbitration* (Volume 1, Thomson Carswell), *Maple Leaf Poultry*, [1998] O.L.A.A. No. 62 (Barrett), and *Medicine Hat News*, (1994), 43 L.A.C. (4th) 110 (McFetridge) in support of his position.

13. In the alternative, counsel for the responding party submits that the Board should exercise its discretion to allow the witness to testify on this issue, particularly in a case like this where the breach of the rule was inadvertent, the evidence is key to the party's case, and the situation can be remedied in a manner which is fair to all involved. Cited in support of that proposition are *John Boddy Developments Ltd.*, cited above, and *The Board of Education for the City of Windsor*, [1996] O.L.R.D. No. 2331, a decision of this Vice-Chair.

14. The Board has had a number of opportunities to discuss the application of the rule in *Browne v. Dunn* to its proceedings. A number of recent Board decisions (*John Boddy Developments Ltd.* and *Pre-Eng Contracting Ltd.*, cited above, and *The Cadillac Fairview Corporation Ltd.*, [2008] OLRB Rep. July/August 491 (Aug. 4, 2008)) describe the rule and the principles that the Board considers when determining whether to apply the rule to any given situation before it.

15. As noted by the Board at paragraph 34 of *John Boddy Developments Ltd.*, the decision to accept or reject a piece of evidence in any given proceeding must be made by reference to the statutory mandate provided to the Board under the Act. That decision should be informed by principles that support the sound conduct of labour relations in the Province of Ontario. Having regard to the purposes identified in section 2 of the Act and the broad discretion provided to the Board pursuant to subsections 111(1) and 111(2)(e) of the Act, the Board can accept or reject any particular piece of evidence. However, the discretion provided to the Board must be exercised having regard to "the specific circumstances surrounding the introduction of the evidence, the applicable labour relations principles, and the law of evidence, particularly as developed and applied by the Board". One aspect of the law of evidence that has been developed and applied by the Board is the rule in *Browne v. Dunn*.

16. The rule in *Browne v. Dunn* is a procedural rule of fairness. In essence, the rule provides that if a party intends to challenge the credibility of a witness through the evidence of others, it is incumbent upon that party to provide the witness with an opportunity to understand the substance of that evidence and to explain it, before that evidence is called. It is unfair to the witness to not put to him or her the substance of the evidence that will be called to undermine that witness's testimony, and then subsequently assert that the evidence given by that witness was not credible. As noted by the Board in *John Clark*, [1991] OLRB Rep. May 598, the evidence in dispute may only relate to collateral facts, as opposed to substantive or significant facts. In the former situation, it may not be as problematic to permit the admission of evidence that does not comply with the rule. However, questions that go to whether a person is properly on the Schedule "A" list of employees are questions that relate to a substantial or core issue in a certification proceeding, and are not properly considered as "collateral" in nature (see *Mason Homes Ltd.*, cited above, *Capital Environmental Resources Inc.*, (2001) CanLII 16639 (Aug. 14, 2001), and *John Boddy Developments Ltd.*, cited above).

17. In my view, the facts of this case reflect the very circumstances that the rule in *Browne v. Dunn* is meant to address. There can be no dispute that whether Mr. Gayle was at work on the application filing date is a substantial and core issue in this proceeding. Yet Mr. Gayle was not challenged at all by the responding party regarding his assertion that he was at work on the application filing date performing bargaining unit work. Nor were Messrs. White, Bennet or Little challenged regarding their testimony that Mr. Gayle was in attendance at the Gold's Gym site on the application filing date. The responding party now wishes to adduce evidence through Mr. Witkowski that expressly contradicts the evidence of all four witnesses, wishes to rely upon that evidence to challenge the credibility of the applicant's four witnesses and, ultimately, wishes to rely upon that evidence to establish that Mr. Gayle was not at work on the application filing date.

18. Counsel for the responding party asserts that the rule in *Browne v. Dunn* does not apply in the circumstances, because a witness need not be asked in cross-examination by a party about a proposition that will obviously be subject to contradictory evidence called by that same party. The responding party specifically relies upon the reasoning of Lord Herschell in *Browne v. Dunn*:

> "… I mean upon a point on which it is not otherwise perfectly clear that he has had full notice beforehand that there is an intention to impeach the credibility of the story which he is telling. Of course, I do not deny for a moment that there are cases in which that notice has been so distinctly and unmistakably given, is so manifest, that it is not necessary to waste time in putting questions to him upon it".

In this proceeding, the proposition raised by the responding party is that Mr. Gayle was not in fact at work on the application filing date. The responding party asserts that the applicant could not have been surprised by Mr. Witkowski's evidence, because it clearly raised the question of whether Mr. Gayle was at work on the application filing date in its written submissions filed with the Board. As noted above, the responding party asserts that it would have been a "waste of time" to put the proposition that Mr. Gayle was not at work to Mr. Gayle or to the other witnesses called by the applicant, because they would have just denied the proposition.

19. In my view, the situation is somewhat more complicated than the way that it has been described by the responding party.

20. It is important to keep in mind that at no time before calling Mr. Witkowski as a witness did the responding party identify the basis upon which it asserted that Mr. Gayle was not at work on the application filing date. That is, the identity of Mr. Witkowski (or any other witness who might be called to testify on this issue) as the person who would support its assertion that Mr. Gayle was not at work on the application filing date was not disclosed by the responding party in its written submissions to the Board. As a result, the applicant was to a great extent "flying blind" when it called its testimony regarding Mr. Gayle's whereabouts on May 17, 2008. The basis upon which the responding party asserted that Mr. Gayle was not at work on the application filing date was known only to the responding party.

21. In that context, little would have been advanced by requiring the responding party in cross-examination to have put to the applicant's witnesses the bare proposition that Mr. Gayle was not at work on the key date. Based on the evidence that each witness gave during his examination-in-chief, each would have disputed such a general assertion. However, if the responding party had indicated to each witness that Mr. Witkowski would subsequently testify that Mr. Gayle was not at work on the application filing date, and what Mr. Witkowski was expected to state about his observations on that date, the response from Mr. Gayle and the other three witnesses might well have been different than just a blanket disagreement. Some of the witnesses recalled seeing Mr. Witkowski on site that day, and others (including Mr. Gayle) could not recall seeing him. As a result, some of the witnesses may have challenged the responding party's assertion that Mr. Witkowski himself was at work on that date, and explained why they challenged that assertion. More importantly, Mr. Witkowski's testimony almost certainly will not be limited to the bare assertion that he was at work on that application filing date, and that Mr. Gayle was not at work. Presumably Mr. Witkowski will testify to what he himself observed on the application filing date in order to buttress his testimony (i.e. who amongst the five individuals in question he saw at work on the application filing date, when he saw them, where they were working when he saw them, who they were working with at the time, and what they were doing at the time). In the absence of such supporting testimony, having regard to the testimony given by the applicant's four witnesses, Mr. Witkowski's bald assertion that Mr. Gayle "was not at work" would have little persuasive value. The substance of all of the evidence that the responding party anticipated that Mr. Witkowski would give regarding his presence at the site on the application filing date, and what he observed on that date, should have been put to the witnesses for comment. Putting that anticipated evidence to the witnesses would not be a "waste of time", because it could trigger for Mr. Gayle and the other three witnesses one or more explanations for what appears on its face to be contradictory evidence.

22. As a result, although it is accurate to assert that no real value would be achieved by putting to Mr. Gayle and to the other three witnesses the bald proposition that the responding party's evidence would be that Mr. Gayle was not at work on the application filing date, putting to the four witnesses the identity of those individuals who would make that assertion, and the full substance of their expected testimony on their observations of the application filing date, would have been significant. The purpose of introducing this evidence through Mr. Witkowski (and perhaps others) is to impeach the credibility of Mr. Gayle and the applicant's other three witnesses. Yet none of those witnesses was given any opportunity to respond to what it is that Mr. Witkowski has already stated or will proceed to say regarding his observations on the day in question. In the normal course, it would be extremely unfair to Mr. Gayle, to the three other witnesses, and to the applicant to permit the evidence of Mr. Witkowski on this point to be called.

23. As noted by the Board in *John Boddy Developments Ltd.*, even where the rule in *Browne v. Dunn* does apply, the Board has the discretion to allow the introduction of the evidence in question, subject to providing the opposite party with an opportunity to call reply evidence. In this proceeding the responding party submits, as an alternative position, that this is an appropriate approach. In *John Boddy Developments Ltd.*, the Board noted that in deciding whether to exercise this discretion, the nature of the breach, the circumstances surrounding the breach, the potential prejudice to the other party, and the impact on the orderly conduct of the litigation in question are factors that should be considered.

24. I do not believe that the responding party purposely held back its proposed evidence of Mr. Witkowski for the purpose of surprising the applicant. I also accept that the responding party did not abandon its position that Mr. Gayle was not at work on the application filing date when it failed to cross-examine Mr. Gayle and the applicant's other witnesses regarding Mr. Gayle's attendance at work on the application filing date. Counsel for the responding party asserted during argument that his failure to cross-examine on this issue was inadvertent, and I accept his assertion.

25. That stated, in my view the circumstances reflected by this proceeding do not support the exercise of discretion to relieve against the application of the rule in *Browne v. Dunn*. Whether Mr. Gayle was physically present at work on the application filing date was identified by the responding party as a key issue at various times, including at the outset of the very day that Mr. Gayle was cross-examined. This is not a situation where the applicant has by act or omission contributed to the situation in which the responding party finds itself. The applicant called evidence through all of its witnesses to establish Mr. Gayle's whereabouts on the application filing date. The responding party had every opportunity to properly put its proposed evidence to these witnesses, and failed to do so.

26. In my view, critical to the question of whether I should exercise my discretion to allow this evidence is the potential prejudice to the applicant, and the impact on the orderly conduct of the hearing of the proposed solution suggested by the responding party. The evidence of Mr. Witkowski on the issue of Mr. Gayle's attendance at work on the application filing date has not yet been completed. In fact, we are only one question in, and as noted above it can only be expected that in the normal course more testimony from Mr. Witkowski consisting of his recollection of his observations on the application filing date would be offered. Should evidence of that nature be permitted, it is almost certain that the applicant would desire to recall Mr. Gayle and the other three witnesses to challenge, explain and/or comment upon the evidence given by Mr. Witkowski. However, even if Mr. Witkowski's testimony were limited to that which is currently on the record - that through his personal observation Mr. Gayle was not at work at the Gold's Gym site on the application filing date – it would not be unreasonable for the applicant, out of an abundance of caution, to recall Mr. Gayle, Mr. White, Mr. Bennet and Mr. Little to shore up their observations of Mr. Gayle's whereabouts on the application filing date. Mr. White and Mr. Little reside in Sarnia, Ontario, and Mr. Gayle and Mr. Bennet reside in London, Ontario. The applicant would be put to considerable inconvenience and expense in order to arrange for the attendance of these four witnesses, and the witnesses would be inconvenienced by having to attend in Toronto, Ontario, to testify once again.

27. It is possible in certain circumstances to remedy a situation such as this through the calling of reply testimony. Here, however, the use of reply testimony to solve the fairness problem created by the responding party will unnecessarily lengthen and complicate this proceeding, contrary to one of the purposes of the Act, which is to promote the expeditious resolution of workplace disputes. Counsel for the responding party asserted in his written submissions that the suggestion by the

applicant that "the hearing, basically, would have to begin again" is "totally unfounded", because the questions proposed to be put to the four witnesses "would be very narrow and simply call for agreement or disagreement, and no new evidence". However, as pointed out above, the situation is somewhat more complicated than the way it has been described by the responding party in its written submissions. Depending upon the breadth of the evidence provided by Mr. Witkowski regarding his observations on the application filing date, the applicant may be required to call its entire case on this issue all over again in reply evidence. The responding party will then fully cross examine the applicant's witnesses on this issue. Because the applicant's witnesses would be testifying some time after their initial testimony (particularly Mr. Gayle, who testified in August, 2008), the possibility that one or more of those witnesses would contradict elements of their initial testimony is much higher. This too puts the applicant at a major disadvantage, as the credibility of its witnesses may be subject to challenge on that basis as well. As noted by the Board in *The Cadillac Fairview Corporation Ltd.*, cited above, in these circumstances the evidence becomes "disorganized and may suffer in coherence".

28. There is also the possibility that the applicant may consider it appropriate to call further witnesses to bolster the testimony of the four witnesses who have testified and would return to testify in reply. This would prejudice the applicant and add to the delay in disposing of this proceeding. As noted above, I agree with the responding party that it did not abandon its position regarding Mr. Gayle merely because it did not comply with the rule in *Browne v. Dunn*. However, it was not unreasonable at all for opposing counsel to consider the substance of the cross-examination of her witnesses when she assessed the extent to which she had to call evidence to establish Mr. Gayle's presence at work on the application filing date. As noted by counsel for the responding party, that evidence would not have been available through Len White, who was unavailable on the hearing dates in November, 2008. However, it is possible that further evidence may have been secured through others on site on the application filing date, or through those who are said to have met with Mr. Gayle after the workday had finished. Although the responding party asserts that its failure to cross-examine witnesses on the issue of Mr. Gayle's attendance at work on the application filing date does not eliminate the applicant's obligation to prove its case, in the circumstances it is hardly credible for the responding party to assert that the applicant ought to have appreciated that it needed to call all available evidence to establish Mr. Gayle's presence on site.

29. Taking all of the above into account, there is very little that leads me to conclude that I ought to exercise my discretion in favour of allowing the responding party to call evidence on the issue of Mr. Gayle's attendance at work on the application filing date. If Mr. Witkowski is permitted to testify on this issue the four witnesses and the applicant will be significantly inconvenienced in order to resolve a problem caused by the failure of the responding party to comply with a well-known procedural rule – a rule that the responding party complied with during cross-examination with respect to many other factual issues in dispute.

30. One of the cases relied upon by the responding party in support of its position is *The Board of Education for the City of Windsor*, cited above. In that case, a construction industry grievance arbitration, the employer terminated the employment of one of its employees on the basis that he had been charged with two counts of possession of cocaine for the purpose of trafficking. At the hearing, the employer called two witnesses who testified that the grievor had admitted to possession of the drugs and to selling the drugs to make extra money. The witnesses were not challenged on this testimony during cross-examination. Subsequently, the grievor testified that he did

not make the admissions these two witnesses asserted he had made. Counsel for the employer asserted that the evidence should not be admitted having regard to the rule in *Browne v. Dunn*.

31. I ultimately allowed the evidence of the grievor to be admitted. The issue of whether the grievor admitted to the sale of cocaine was critical to his case, and as noted by the decision I was "loathe to exclude the evidence unless it is virtually impossible to remedy the situation in a way that is fair to all involved". I was also mindful of the fact that the failure to put the appropriate questions to the witnesses was inadvertent and not intentional – as in the instant case. In the circumstances of that proceeding, there was a means of rectifying the situation without prejudicing the employer, because the union had undertaken to return both witnesses to Toronto from Windsor for the hearing, with all reasonable costs to be paid by the union. Minimal additional hearing time would be required to hear the evidence, and therefore the employer would not be prejudiced in any meaningful manner.

32. Here, the circumstances are considerably different. As noted above, I do not dispute counsel's statement that his failure to question Mr. Gayle and the three other witnesses called by the applicant regarding the evidence of Mr. Witkowski was inadvertent. I also agree that the evidence to be called through Mr. Witkowski is critical to one of the issues raised by the responding party in this proceeding. However, I do not believe that it is possible in the current circumstances to remedy the situation in a way that is fair to all involved, as I did in *The Board of Education for the City of Windsor*. As noted above, if Mr. Witkowski's testimony is allowed it is almost certain that at least four witnesses will have to be recalled to testify regarding their observations on the application filing date, in the context of Mr. Witkowski's testimony regarding his observations on that date. Their testimony will be much more lengthy, and therefore require far more hearing time to complete, than that in *The Board of Education for the City of Windsor*. The reply testimony will also be heard many months after the witnesses initially testified, which is far different than the situation in *The Board of Education for the City of Windsor*, where the evidence was called within one month of the initial testimony.

33. Just as importantly, in *The Board of Education for the City of Windsor* the party that failed to comply with the rule in *Browne v. Dunn* undertook to return the two witnesses in question to Toronto for the hearing and to assume all reasonable costs of doing so. The responding party in this proceeding has not made a similar undertaking, which leads me to conclude that it expects the applicant to bear the full financial cost of recalling the four witnesses who have testified, and any other witnesses that the applicant reasonably believes to be necessary to establish its case regarding Mr. Gayle's attendance at work on the application filing date. Of course, the responding party need not give such an undertaking – but in the absence of doing so, it can hardly rely upon *The Board of Education for the City of Windsor* as an authority in support of its position.

34. Finally, counsel for the responding party submitted that if I were to conclude that any of the applicant's witnesses ought to be given an opportunity to have "this brief contradictory evidence put to them", that opportunity could be accomplished in an expeditious manner by way of telephone conference or video conference. This was an option that I considered in *The Board of Education for the City of Windsor*.

35. In this case, the option of telephone conference or video conference is not particularly attractive. For the reasons identified above, I do not believe that the evidence to be heard from the four witnesses to date regarding Mr. Witkowski's observations on the application filing date would be fairly characterized as "brief". The situation in *The Board of Education for the City of Windsor* was

different, because the substance of the evidence to be put to the two witnesses was very limited. Furthermore, based on the evidence to date, it appears that the credibility of all witnesses will be an important consideration. In that context, it is preferable that the testimony of all witnesses be taken in person, if at all possible.

36. For the reasons outlined above, the applicant's objection to Mr. Witkowski's evidence is sustained. I will not consider the evidence given by Mr. Witkowski on this issue to date. In addition, for the purposes of challenging the credibility of the applicant's four witnesses with respect to the question of Mr. Gayle's attendance at work on the application filing date, the responding party will not be permitted to rely upon evidence touching on that issue that has not been put previously to the four witnesses in the manner required by the rule in *Browne v. Dunn*.

37. This proceeding is scheduled to continue on January 23 and 28, 2009. I am seized of this proceeding.

1458-08-R Carpenters District Council of Ontario, United Brotherhood of Carpenters and Joiners of America, Applicant v. **Jensen Building Ltd.**, Responding Party

Certification – Construction Industry – Practice and Procedure – The applicant, applying for certification with membership cards for Local 249, mistakenly named the Carpenters' Union, Central Ontario Regional Council (in which Local 249 is not a constituent member), instead of the Carpenters District Council of Ontario, as applicant – The Board, relying on s. 112, permitted the applicant to amend its name because: the change was not a substantive one; it was a *bona fide* mistake which created no advantage for the applicant nor any prejudice to the respondent; and the mistake did not affect the integrity of the membership evidence – Motion to amend allowed, matter continues

BEFORE: *Marilyn Silverman*, Vice-Chair.

APPEARANCES: *Mike McCreary* and *Gary Murphy* appearing for the applicant; *Vince Panetta* and *Jorgen Jensen* appearing for the responding party.

DECISION OF THE BOARD: December 3, 2008

1. This is an application for certification filed under the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act") that the applicant elected to have dealt with under section 128.1 of the Act.

2. The issue before me is a preliminary one as to whether the applicant should be allowed to amend its name. The application was filed in the name of the Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America ("CORC"). It seeks the amendment to the Carpenters District Council of Ontario, United Brotherhood of Carpenters and Joiners of America ("the CDC"). The membership evidence submitted in support of this application is an application for membership in the United Brotherhood of Carpenters and Joiners of America, Local 249 ("Local 249").

3. The applicant relies on section 112 of the Act that provides as follows:

> **112.** Where in any proceeding before the Board the Board is satisfied that a mistake has been made in good faith with the result that the proper person or trade union has not been named as a party or has been incorrectly named, the Board may order the proper person or trade union to be substituted or added as a party to the proceedings or to be correctly named upon such terms as appear to the Board to be just.

4. The application was filed on August 5, 2008. It is an ICI application and if the applicant were to succeed, the Carpenters Provincial ICI agreement would govern the relationship. The Board (differently constituted) found in paragraph 2 of its decision of August 13, 2008 that a number of locals, not including Local 249, were constituent members of CORC. Although that may be true, that is of no assistance to the applicant in this application since Local 249 is not one of those listed locals. Local 249 is not a constituent member of CORC but is a constituent trade union of the CDC. CDC is the employee bargaining agency for the Carpenters Provincial Collective agreement.

5. Both parties filed post regional certification meeting submissions in October 2008. That is when the applicant sought the amendment. In those submissions, CORC and/or the CDC say that the counsel who prepared the application for certification, who is not counsel of record on this motion, made a *bona fide* error. It relies on two decisions *Imperial Flavours Inc,* [1984] OLRB Rep. May 723 and *Goody Canada Limited,* [1990] OLRB Rep. Feb. 159 where amendments were allowed when the name of the applicant was not the same as the name on the cards submitted. Both of these cases were in the non construction sector and in both cases the amendments were permitted.

6. Although the motion was made by the applicant, I chose to hear submissions from the responding party first. The responding party does not dispute that it suffers no prejudice if the amendment is granted. It does not dispute the reason advanced by the applicant for the error. It instead asserts that the conditions of section 112 of the Act have not been met because the error is not *bona fide* and further argues that the scrutiny afforded a card based application must be rigorous.

7. The responding party asserts that the applicant must be held to a standard of correctness in filing its material since in a card-based application that is what the Board bases its decision on. It argues that the applicant should know its own structure. It relies on three decisions. In *P.R.C. Chemical Corporation of Canada Ltd.,* [1980] OLRB Rep. May 749 the Board would not accept membership evidence where the $1.00 payment (referred to by the panel as a substantive requirement going to proof of membership), then required had not been made. This was in the face of a union declaration with explicit reference to the payment shown. The responding party in the instant case relies on the reference in *P.R.C. Chemical Corporation of Canada Ltd., supra,* that the union knew or should have known what was required. The Board in that case rejected that $1.00 payment was a mere technicality and dismissed the application. In *Triac Industries Inc.,* [2000] O.L.R.D. No. 439 (Mar. 17, 2000), an application to terminate bargaining rights, the Board first determined that the applicant employee should have properly cited the name of the responding union and then reconsidered its decision on that point and allowed the amendment. The other cases cited are *Simcoe County District School Board,* [1998] O.L.R.D. No. 2338 where the Board dealt with two completely different employer entities and *H. Carp Ltd. (c.o.b. Ace Wrecking Co.),* [2005] O.L.R.D. No. 4306 (Oct. 21, 2005) where the Board allowed a minor amendment to the name of the responding party where it determined that the mistake was made in good faith.

8. In summary, the responding party says that the name of the applicant is a critical requirement and this application should be dismissed, not amended.

9. At the conclusion of the responding party's submissions I issued the following oral ruling:

> Having regard to the purpose and provisions of section 112 of the Act, the submissions and authorities relied on by the responding party and the facts of this case, the applicant's motion is granted. Applicant's counsel, not counsel in this motion, made and acknowledged a mistake in the name it cited in filing the application. It was not a mistake that was made by the applicant with any intention or effect of misleading the Board or the responding party. It is minor, insignificant and more importantly has no affect whatsoever on the integrity of the membership evidence. Accordingly, the name of the applicant will be amended as the applicant requests. I will provide fuller written reasons for this decision.
>
> In the meantime, the matter is referred to the Registrar to schedule for two days of hearing to deal with the remaining disputes in this file.

10. Here are those reasons. This case is not like any of those cited by the responding party. First, the change requested here is not a substantive alteration. It is one directly contemplated by section 112 of the Act. Second, the mistake was *bona fide* as it was made by then counsel and not by the applicant to secure some advantage. There could be no advantage secured by a mistake of this nature. Finally, the mistake and requested amendment does not affect the integrity of the membership evidence in this file. The individuals signed cards for a local of the Carpenters Union – that essential feature is not changed or altered by allowing for the requested amendment. In each case cited in support by the responding party, the membership evidence came into doubt or at least the possibility that the employees at issue or the Board may have been misled. That is not the case here. To dismiss an application as the responding party suggests because of a *bona fide* error of this nature that does not prejudice the responding party nor mislead the individual signers is not appropriate.

11. For all these reasons, the motion to amend is allowed. Accordingly, the style of cause is hereby amended to read as the name of the applicant Carpenters District Council of Ontario, United Brotherhood of Carpenters and Joiners of America. Further paragraph 2 of the Board's decision of August 13, 2008 is deleted and replaced with the following:

> The Registrar has certified that the applicant has been found to be a trade union in an earlier proceeding under the Act and an official of the applicant with knowledge of its affairs has declared the applicant is a council of trade unions that represents trade unions that according to established trade union practice pertain to the construction industry. Therefore, having regard to section 113 of the Act, the Registrar's certificate and the applicant's declaration, the Board finds that the applicant is a trade union within the meaning of section 1(1) and a council of trade unions within the meaning of section 126(1) of the Act. Having regard to the information provided by the applicant the Board is satisfied that Locals 18, 27, 93, 249, 397, 446, 494, 675, 785, 1256, 1669, 1946, 1988, 2041, 2222 and 2486 are constituent trade unions of that council.

12. There remain six status disputes; one employee whom the responding party challenges and five whom the applicant challenges. The first day of hearing shall begin with the applicant producing for examination the one individual whom it asserts is in the bargaining unit. The responding party

should also have in attendance at that first day of hearing two of the five individuals it contends are in the bargaining unit and whom the applicant challenges. Unless the panel hearing this case decides otherwise, the remaining three challenged individuals should be present to testify on the second day of hearing.

13. I am not seized of this application.

1784-08-R Construction Workers Local 53 affiliated with the Christian Labour Association of Canada, Applicant v. **Looby Construction Limited**, Responding Party v. Labourers' International Union of North America, Ontario Provincial District Council, Intervenor

Certification – Construction Industry – The OPDC (LIUNA) challenged the timing of CLAC's application on two grounds: (1) there were two earlier applications for certification filed by LIUNA in which there is some overlap in bargaining unit with the present application; and (2) the present application is barred because it relates to the same bargaining unit that was dismissed pursuant to s. 128.1(14)(e) in one of the two earlier applications – The Board allowed the instant application to proceed because the description of the bargaining unit in the earlier "live" application has not yet been determined – Furthermore, the Board found s. 128.1(15) to be analogous to s. 10(3) of the Act in that reference is made to individual employees in the bargaining unit, and not positions in the unit, so a unit with an entirely new complement of employees cannot be barred from proceeding – Matter continues

BEFORE: *Harry Freedman*, Vice-Chair, and Board Members *John Tomlinson* and *Richard Baxter*.

DECISION OF THE BOARD; November 25, 2008

1. The Board, differently constituted, by decision dated October 27, 2008 directed the parties to make submissions with respect to the applicability of section 128.1(15) of the *Labour Relations Act, 1995,* S. O. 1995, c. 1 as am. (the "Act") to this application for certification the applicant elected to have dealt with under section 128.1 in view of the dismissal of an application for certification in Board File No. 0777-07-R. That earlier application had been filed by the Labourers' International Union of North America, Ontario Provincial District Council ("the OPDC").

2. The Board at paragraph 3 of its October 27th decision noted that the application in Board File No. 0777-07-R had been dismissed pursuant to section 128.1(14)(e) of the Act following a representation vote because fewer than half the ballots cast in that vote were cast in favour of the OPDC. That October 27th decision at paragraph 5 then states:

> It appears from a review of Schedule A to the responding party's response in the instant application that there is no reason why the Board ought not to consider it now that the application in Board File No. 0777-07-R has been dismissed. In particular, subsection 128.1(15) of the Act does not apply because there is no overlap between the names of those who were eligible to vote as members of proposed bargaining unit in Board File No. 0777-07-R and the names of those employees the employer claims were employed in the bargaining unit proposed in the instant application.

3. The Board indicated it would consider this application unless the parties made submissions arguing why it should not do so.

4. Both the responding party and the intevenor (the "OPDC") filed submissions asserting that section 128.1(15) precludes the Board from considering this application. The Board has not received any submissions from the applicant.

5. The OPDC argues there are two distinct grounds for the Board to either dismiss or defer consideration of this application. It contends there is currently an application for certification filed by Labourers' International Union of North America, Local 1059 ("Local 1059") pending before the Board in Board File No. 0296-07-R. That application for certification relates to a bargaining unit of construction labourers employed by the responding party in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and in all other sectors of the construction industry in Board Area 3. This application for certification proposes a bargaining unit comprised of construction labourers, carpenters and carpenters' apprentices in all sectors of the construction industry in Board Area 16. The Board determined the appropriate bargaining unit in the application for certification in Board File No. 0777-07-R was construction labourers employed by the responding party in all sectors of the construction industry other than the industrial, commercial and institutional sector in Board Area 16 and in certain other geographic townships. Thus, the bargaining unit proposed in this application overlaps but is not congruent with the bargaining unit the Board found appropriate in Board File No. 0777-07-R. Similarly, the bargaining unit proposed in this application also overlaps but is not congruent with the bargaining unit found appropriate in the application made by Local 1059 in Board File No. 0296-07-R. Based on the overlap of bargaining units, the OPDC submits the Board should either defer consideration of this application pending the determination of the application in Board File No. 0296-07-R or dismiss this application.

6. The second basis for seeking dismissal of this application arises from the operation of section 128.1(15) of the Act. The OPDC submits this application is barred by reason of section 128.1(15) since this application relates to the same bargaining unit that was the subject of the application in Board File No. 0777-07-R that was dismissed under section 128.1(14)(e) following a representation vote. Section 128.1(15) states:

> If the Board dismisses an application for certification under clause (14) (e), the Board shall not consider another application for certification by any trade union as the bargaining agent of any employee who was in the bargaining unit proposed in the original application until one year after the original application is dismissed.

The OPDC submits it is irrelevant that this application for certification involves employees who are not the same persons who were the subject of the application that was dismissed in Board File No. 0777-07-R. It argues that although the applications involve different individuals, they are all "employees" in the same bargaining unit.

7. The responding party disagrees with the OPDC's first ground for dismissing or deferring this application but adopts the OPDC's second ground. The responding party submits that the dismissal of the application for certification results in the applicant in this proceeding being barred from seeking certification for employees in the same bargaining unit.

8. The applicant did not file any submissions.

9. The Board has not yet determined the description of the appropriate bargaining unit in this application. The Board's discretion allowing it to defer consideration of an application for certification pending the determination of an earlier application for certification in respecting the same employer arises from section 111(3) of the Act. Section 111(3) of the Act provides, in part:

> (3) Despite sections 7 and 63, where an application has been made for certification of a trade union as bargaining agent for employees in a bargaining unit … and a final decision of the application has not been issued by the Board at the time a subsequent application for the certification … is made with respect to any of the employees affected by the original application, the Board may,
>
> (a) treat the subsequent application as having been made on the date of the making of the original application;
>
> (b) postpone consideration of the subsequent application until a final decision has been issued on the original application and thereafter consider the subsequent application but subject to any final decision issued by the Board on the original application; or
>
> (c) refuse to entertain the subsequent application.

It is, in our view, premature to determine whether this application is affected by the earlier application in Board File No. 0296-07-R as the Board has not yet determined the description of the appropriate bargaining unit. We note the applicant and responding party have agreed on the description of the bargaining unit (although the responding party indicates in its response the one project where it was working was on Highway 11 North Bay in Board Area 15, not Board Area 16), but the Board has not yet found the agreed upon unit appropriate for collective bargaining. The bargaining unit description in the pending application in Board File No. 0296-07-R does overlap in respect of construction labourers employed in the industrial, commercial and institutional sector of the construction industry in Board Area 16 with the bargaining unit the applicant and responding party have agreed is appropriate in this proceeding

10. The Board notes the employees in the bargaining unit who are the subject of the application in Board File No. 0296-07-R are not the same individuals who the applicant seeks to represent in this application. Section 111(3) refers to the situation where a "subsequent application … is made with respect to *any of the employees* affected by the original application". Whether the actual identify of any of the persons affected by the applications must be the same before the Board will exercise its discretion under section 111(3) need not be determined at this stage of the proceeding. The Board is not prepared to preclude the applicant from proceeding with this application on the basis of the OPDC's first ground since the Board's determination of the appropriate bargaining unit may render the OPDC's argument moot and make it unnecessary to determine that issue.

11. With respect to the OPDC's second ground with which the responding party agrees, the Board notes that section 128.1(15) of the Act is virtually identical to section 10(3) of the Act. Section 10(3) provides:

> If the Board dismisses an application for certification under this section, the Board shall not consider another application for certification by any trade union as the

> bargaining agent of any employee that was in the bargaining unit proposed in the original application until one year after the original application is dismissed.

The only difference between section 10(3) and section 128.1(15) is that section 10(3) refers to an application for certification being dismissed "under this section" whereas section 128.1(15) refers to an application for certification being dismissed "under clause (14)(e)".

12. The Board in *Bayview-Wellington Homes Inc.*, [2001] OLRB Rep. Nov./Dec. 1346 (Nov. 7, 2001) analysed the language of section 10(3) of the Act shortly after that provision was added to the Act. At page 1350-51 it begins the analysis of the words in that section:

> 22. In order to understand the legislative intention of the new bar provisions from the words of the statute we consider section 10(3) in detail. The change from the previous section 10(3) expands the scope of the bar from the particular applicant union to all unions. Section 10(3) sets out conditions for the imposition of the bar to an application for certification. One of those conditions is that the Board shall not consider an application where that application is by "… any trade union that was the bargaining agent of any employee that was in the bargaining unit proposed in the original application". When section 10(3) refers to "…any employee that was in the proposed bargaining unit…" it is less than clear whether the reference is to actual individual employees or to positions within the bargaining unit. The employer's argument depends upon the latter conclusion.

The Board explains the reason for rejecting the employer's submission at page 1351:

> 25. The employer's argument effectively reads out the words "… of any employee that was in…" in section 10(3). If those words are considered, as they must be, then the employer cannot succeed. The Board cannot simply look at the proposed bargaining unit and find no relevance to the list of employees.
>
> 26. Accordingly we find that the legislature intended that the reference to employee in section 10(3) be a reference to a specific employee.

At page 1352, the Board sets out its conclusion:

> 33. The legislature's intention must be derived from the words of the statute. As stated in *Windsor Racetrack Slots #2*, [*Ontario Lottery & Gaming Corporation c.o.b. Windsor Racetrack Slots*, [2001] OLRB Rep. March/April, 532] the intention of the legislative change in section 10(3) was to broaden the bar. The bar is broader than it was. It now applies to all unions. The device used n the words of the existing statute is to identify individuals rather than bargaining units or the position of the individual. The legislature did that by using the word "any employee" in the statute. As stated, the result of that is where there is an entirely new group of employees in the new application from those who were the subject of the original application the statute does not impose a bar.

13. The analysis developed by the Board in *Bayview-Wellington Homes Inc.* was adopted by the Board in *Greenvilla Homes*, [2005] OLRB Rep. Mar./Apr. 299 (Mar. 21, 2005). While those two decisions dealt with the effect of section 10(3) on an application for certification made after an earlier application for certification had been dismissed under section 10(2), in view of the parallel language

used in section 128.1(15) of the Act, we are satisfied the Board's interpretation of section 10(3) applies equally to section 128.1(15). Therefore, we conclude that section 128.1(15) of the Act does not preclude the Board from considering this application.

14. The Board is therefore prepared to proceed with this application.

15. The Registrar has certified that the applicant has been found to be a trade union in an earlier proceeding under the Act and the Ontario Representative of the applicant with knowledge of its affairs has declared the applicant is a trade union that according to established trade union practice pertains to the construction industry. Therefore, having regard to section 113 of the Act, the Registrar's certificate and the applicant's declaration, the Board finds that the applicant is a trade union within the meaning of sections 1(1) and 126(1) of the Act.

16. The responding party filed its response with the Board within the time stipulated by Rule 25.5 of the Board's Rules of Procedure and provided the Board with the requisite information in accordance with subsection 128.1(3) of the Act.

17. The applicant advised the Board the only unrepresented trades the responding party had in its employ on the application date were construction labourers and carpenters. This information has been confirmed by the responding party.

18. The applicant listed one project (Highway 11, North Bay) where the employees it seeks to represent were working on the application date and claims there were two employees in its proposed bargaining unit in Board Area 16. The responding party also referred to one project on Highway 11 North Bay but says it is in Board Area 15. Board Area 15 includes the geographic area in the vicinity of the Regional Municipality of Ottawa-Carleton. That geographic area is well over 250 kilometres from any part of Board Area 16. Board Area 16 is the area within a 33 kilometre radius of the North Bay Post Office. We are satisfied the project where the responding parties employees were working was in Board Area 16 and not Board Area 15 as asserted by the responding party.

19. The responding party claimed there were three employees at work in the bargaining unit. The applicant submitted there were two employees in that unit.

20. The applicant and responding party agreed that all construction labourers, carpenters and carpenters' apprentices in the employ of the responding party in Board Area 16 save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees appropriate for collective bargaining. Whether the Board determines that bargaining unit or some other bargaining unit is appropriate will be decided following a Regional Certification meeting.

21. On the basis of only the information provided in the application (including the information and membership evidence filed by the applicant) and the information provided under subsection 128.1(3) of the Act), the Board is satisfied that more than fifty-five per cent of the employees in the bargaining unit to which the applicant and responding party agreed were members of the applicant on the date the application was filed. The applicant filed membership evidence on behalf of two persons, both of whose names appear on the list of employees submitted by the employer.

22. The intervention filed by the OPDC was based on the application in Board File No. 0777-07-R. That application was dismissed. Nevertheless, given the overlap between the description of

the agreed upon bargaining unit and the bargaining unit for which Local 1059 seeks certification, and as Local 1059 is a constituent local of the OPDC the Board is not prepared at this time to dismiss the OPDC's intervention.

23. In our view, it is appropriate to refer this application to a Regional Certification Meeting to permit the parties, including the intervenor, to deal with both the description of the appropriate bargaining unit and the effect, if any, of section 111(3) of the Act in light of the pending application in Board File No. 0296-07-R.

24. This panel of the Board is not seized with this matter.

2263-08-R Labourers' International Union of North America, Ontario Provincial District Council, Applicant v. **Pachecos Contractors Ltd.**, Responding Party

Certification – Construction Industry – The OPDC applied to certify employees of the responding party working on three projects in Board Area 4; the membership evidence was filed on behalf of Local 1081 – The responding party asserted that Local 1059 holds bargaining rights for labourers employed by the responding party in Board Area 3 by virtue of a voluntary recognition agreement, and any of its employees working outside the scope of the Board Area are bound by that agreement – The Board held that, absent a written agreement, it cannot find that a VRA exists – The Board further held that the gratuitous application of terms of a collective agreement does not bind the parties to that agreement – Finally, the Board found that since both Local 1059 and Local 1081 are constituent members of the applicant, the manner in which the applicant collected membership evidence from the employees was irrelevant to the disposition of the application since the employees were already members of the applicant – Certificate issued

BEFORE: *Harry Freedman*, Vice-Chair.

DECISION OF THE BOARD: November 4, 2008

1. This is an application for certification filed under the construction industry provisions of the *Labour Relations Act, 1995*, S.O. 1995, c.1, as amended (the "Act") the applicant elected to have dealt with under section 128.1 of the Act. This application was filed on October 24, 2008. The Alternate Chair of the Board authorized me to sit alone to determine this matter pursuant to section 110(14)(a) of the Act.

2. The Registrar has certified that the applicant has been found to be a trade union in an earlier proceeding under the Act and legal counsel has declared the applicant is a council of trade unions that represents trade unions that according to established trade union practice pertain to the construction industry. Therefore, having regarded to section 113 of the Act, the Registrar's certificate and the applicant's declaration, the Board finds the applicant is a trade union within the meaning of section 1(1) and a council of trade unions within the meaning of section 126(1) of the Act.

3. Having regard to the information provided by the applicant, the Board finds that Locals 183, 247, 493, 506, 527, 607, 625, 837, 1036, 1059, 1081 and 1089 of the Labourers' International

Union of North America, Ontario Provincial District Council are constituent trade unions of the applicant.

4. The Board also finds the applicant is an affiliated bargaining agent of a designated employee bargaining agency. Pursuant to the designation issued by the Minister under section 153(1) of the Act on September 30, 1983, the designated employee bargaining agency is The Labourers' International Union of North America and the Labourers' International Union of North America, Ontario Provincial District Council.

5. The responding party filed its response with the Board within the time stipulated by Rule 25.5 of the Board's Rules of Procedure and provided the Board with the requisite information in accordance with subsection 128.1(3) of the Act.

6. The Board finds that this is an application for certification within the meaning of section 128 of the Act and is an application made pursuant to section 158(1) of the Act which provides that:

> An application for certification as bargaining agent which relates to the industrial, commercial and institutional sector of the construction industry referred to in the definition of "sector" in section 126 shall be brought by either,
>
> (a) an employee bargaining agency; or
>
> (b) one or more affiliated bargaining agents of the employee bargaining agency,
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> on behalf of all affiliated bargaining agents of the employee bargaining agency and the unit of employees shall include all employees who would be bound by a provincial agreement together with all other employees in at least one appropriate geographic area unless bargaining rights for such geographic area have already been acquired under subsection (2) or by voluntary recognition.

7. The applicant asserted the responding party is an excavating contractor that was engaged in three projects on the application date in Brantford, Ontario which is in Board Area 4. The responding party listed four projects where it was performing work, three of which were listed by the applicant and a fourth that was also in Brantford. The responding party agreed with the bargaining unit proposed by the applicant and also agreed with the applicant's estimate of the number of employees who were at work on the application date.

8. The Board further finds, pursuant to section 158(1) of the Act and on agreement of the parties, that all construction labourers in the employ of the responding party in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the responding party in all other sectors of the construction industry in the County of Brant and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Norfolk, save and except non-working foremen and persons above the rank of non-working foreman, constitute a unit of employees of the responding party appropriate for collective bargaining.

9. The responding party asserts that Labourers' International Union of North America, Local 1059 ("Local 1059") holds bargaining rights for the construction labourers it employs in Board Area

3 by virtue of a voluntary recognition agreement entered into on January 31, 1985. I note that Local 1059 is a constituent member of the applicant. The responding party also submits that all employees who were performing bargaining unit work on behalf of the responding party on the application date were members of Local 1059 who were working under the terms and conditions of a "non-ICI Utility Agreement" (the "Utility Agreement") by which it and Local 1059 are bound by reason of a memorandum of agreement dated May 1, 1989. The Utility Agreement is province-wide in scope, but according to the May 1, 1989 memorandum of agreement, the responding party agreed to apply the terms and conditions of the Local 1059 appendix to the Utility Agreement when carrying out utility work in Board Area 3.

10. The voluntary recognition agreement and the memorandum of agreement stipulate Local 1059 holds bargaining rights for construction labourers employed by the responding party in Board Area 3. The responding party contends that when it works outside of Board Area 3, it employs members of Local 1059, and not members of the other constituent local unions of the applicant that have jurisdiction in those other areas. The responding party applies the terms and conditions of the Utility Agreement "applicable to work in the geographical jurisdiction of Local 1059" when it undertakes work outside of Board Area 3, the geographic area over which Local 1059 has jurisdiction.

11. The responding party contends that because it applies the terms and conditions of the Utility Agreement to all areas in the province where it works, and specifically applied that collective agreement to its employees working in Board Area 4 on the date of application, it contends it has in fact granted "*de facto* voluntary recognition" to Local 1059. Although not expressly articulated by the responding party, the Board understands the responding party to be asserting the application is untimely because at the time the application was made, Local 1059 held bargaining rights for the construction labourers employed by the responding party and the responding party was bound by the Utility Agreement.

12. The responding party also submits the applicant obtained membership evidence from its employees through misrepresentations and intimidation. It contends one of the applicant's organizers threatened employees by claiming they would lose their jobs if they did not sign membership evidence, and were required to sign union cards in order to keep working in Brantford. The responding party submits the application should be dismissed or in the alternative, a vote should be directed among the employees.

13. The responding party acknowledges there is no agreement in writing with Local 1059 that confers recognition and bargaining rights on Local 1059 beyond Board Area 3. Without a voluntary recognition agreement being in writing, the Board cannot find that a voluntary recognition agreement exists so as to render an application for certification untimely. See *Middlesex County Board of Education*, [1974] OLRB Rep. April 239.

14. The essence of the responding party's submissions is that because it applies the terms and conditions of the Utility Agreement in Board Area 4 or everywhere it works outside of Board Area 3, it has, by abiding by the Utility Agreement, conferred bargaining rights on Local 1059.

15. Applying the terms of a collective agreement does not, in and of itself, result in being bound by that collective agreement. See *Bechtel Canada Limited,* decision dated September 3, 1975,

unreported, Board File No. 0745-75-R; *Ecodyne Limited,* [1979] OLRB Rep. July 629 at 636; *Comstock Canada Ltd.*, [2006] OLRB Rep. July/August 501 at 507 where the Board wrote:

> …an employer applying all of the terms of a collective agreement to the work performed by its employees does not mean that the union party to that collective agreement has obtained bargaining rights for those employees.

See also *Canform Structures Limited,* [2007] OLRB Rep. Jan./Feb. 28 (Feb. 2, 2007) at 39-40.

16. It is clear, contrary to the submissions of the responding party, that neither Local 1059 nor any other constituent local union of the applicant held bargaining rights for the construction labourers employed by the responding party in Board Area 4 on the application date. This application for certification is therefore timely.

17. The responding party alleges the applicant obtained evidence of membership by advising employees they were required to sign the membership evidence to remain employed with the responding party at their jobs in Brantford, and threatened those employees by advising them that it would be a real problem for them if they did not sign those new cards. The applicant contends that the allegations made by the responding party are wholly lacking in particulars. The applicant notes the responding party advises that it only learned recently of the alleged misconduct by the applicant and undertook to provide additional particulars as soon as they become available.

18. In my view, it is not necessary to assess whether the allegations made by the responding party with respect to the collection of the membership evidence it filed with the Board were adequately particularized. The responding party acknowledges that its employees are members of Local 1059, a constituent local union of the applicant. The membership evidence filed by the applicant is comprised of applications for membership in Labourers' International Union of North America, Local 1081 ("Local 1081"). Local 1081 is also a constituent member of the applicant. Thus, whether the applicant filed evidence confirming the employees' membership in Local 1059 or applications for membership in Local 1081 in support of this application, the result is the same. The Board would have before it evidence of membership in a constituent local of the applicant.

19. There is no dispute, as conceded by the responding party, that all of its employees who are subject to this application were members of Local 1059. Therefore, pursuant to section 12(3) of the Act, those employees are deemed to be members of the applicant for purposes of an application for certification. Moreover, those employees were, at the time the application for certification was made, represented in collective bargaining by a constituent member of the applicant and their employer was applying the terms and conditions of a collective agreement to them although there was no statutory or contractual foundation for that collective bargaining relationship or obligation to apply a collective agreement in Board Area 4. Under these circumstances, the manner in which the applicant collected membership evidence from persons who are employees of the responding party is not relevant to the disposition of this matter since the employees who are the subject of this application were members of the applicant, regardless of whether they had applied for membership in Local 1081 as they were already members of Local 1059.

20. On the basis of only the information provided in the application (including the information and membership evidence filed by the applicant) and the information provided under subsection

128.1(3) of the Act, the Board is satisfied that more than fifty-five per cent of the employees in the bargaining unit were members of a constituent local of the applicant, at the time the application was filed. Therefore, pursuant to section 12(3) of the Act, those individuals are deemed to be members of the applicant. The applicant filed membership evidence on behalf of four persons, all of whom are employees in the bargaining unit.

21. The applicant has asked that it be certified pursuant to section 128.1 relying solely on the number of persons in the bargaining unit who are members of the applicant. It is entitled to do so under section 128.1. There is nothing raised in the application or the response that would cause the Board to consider directing a representation vote.

22. The Board has received no objection from any employee within the time set in the Notice to Employees provided to the responding party for posting.

23. The Board is satisfied that it should certify the applicant.

24. Section 128.1(24) of the Act, which states as follows, provides for the issuance of more than one certificate if the applicant has the requisite support:

> If an election under this section is made in relation to an application for certification that relates to the industrial, commercial and institutional sector of the construction industry referred to in the definition of "sector" in section 126,
>
> . . .
>
> (b) if the Board certifies the trade unions on whose behalf the application for certification was brought as the bargaining agent of the employees in the bargaining unit under clause (13) (a), it shall issue one certificate that is confined to the industrial, commercial and institutional sector and another certificate in relation to all other sectors in the appropriate geographic area or areas;
>
> . . .

Therefore, pursuant to section 128.1(24) of the Act, a certificate will issue to the applicant affiliated bargaining agent on its own behalf and on behalf of all other affiliated bargaining agents of The Labourers' International Union of North America and the Labourers' International Union of North America, Ontario Provincial District Council in respect of all construction labourers in the employ of Pachecos Contractors Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman.

25. Further, pursuant to section 128.1(24) of the Act, a certificate will issue to the applicant trade union in respect of all construction labourers in the employ of Pachecos Contractors Ltd. in all sectors of the construction industry in the County of Brant and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Norfolk, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman.

26. The responding party is directed to post copies of this decision immediately in a location or locations where they are most likely to come to the attention of individuals in the bargaining unit. These copies must remain posted for a period of 30 days.

1770-07-U Scott Wayland, Applicant v. Thompson Products Employees' Association, Responding Party

Duty of Fair Representation – Employment Standards – The employee alleged unfair treatment at the union's hands when it failed to pursue a grievance on his behalf for termination and severance pay – The employee, following a lay-off of 34 weeks, was recalled to work and shortly thereafter elected to take a "preferred lay-off" under the collective agreement and resigned his employment – He then asked the union to assist him in obtaining his entitlements under the *Employment Standards Act* – The union sought advice from the Ministry of Labour as well as its own counsel with respect to the employee's entitlements – Both the ministry and the union's lawyer stated that an employee who elects to take a preferential lay-off cannot use those weeks toward severance entitlements – The applicant was subsequently advised by the ministry that a preferred lay-off did constitute a lay-off under the ESA – The Board, without deciding if the advice the union received and subsequently conveyed to the applicant was correct, found that it was not so wrong as to be arbitrary – Application dismissed

BEFORE: *Brian McLean*, Vice-Chair.

DECISION OF THE BOARD: November 14, 2008

1. This is an application under section 96 of the *Labour Relations Act, 1995* (the "Act") which alleges a breach of section 74 of the Act.

2. By decision dated June 10, 2008 the Board stated:

> 2. The trade union has filed a response. In its response the union requests that the Board decide the matter in its favour without holding a hearing. In the union's view, the application does not disclose a *prima facie* breach of the Act.
>
> 3. The allegations of fact associated with the application are detailed. It is clear that the applicant believes that the union is wrong in its interpretation of the *Employment Standards Act* in deciding not to pursue his claim for termination/severance pay to arbitration. However, what is unclear is how the union behaved in a way that was arbitrary, discriminatory or in bad faith. On the face of the application it is clear that the union obtained a legal opinion regarding the applicant's issue and relied on it in deciding not to pursue the grievance.
>
> 4. The applicant shall have ten days from the date of this decision to explain how his application, assuming all of the facts are true, disclose that the union violated section 74 of the Act.

3. The applicant did not file any submissions in response to the Board's decision. Accordingly, the Board makes it decision on the material before it.

4. The applicant was an employee of Thompson Products. He was represented in his employment relations with Thompson by the responding party union. The application concerns the union's handling of a grievance filed by the applicant for termination and severance pay under the *Employment Standards Act.*

5. The applicant had 11 years seniority with the company when he was laid-off for 34 weeks. The applicant intended to resign if his lay-off lasted 35 weeks. In doing so he would have given up his recall rights so that he could claim termination and severance pay under the Act.

6. The applicant was recalled shortly prior to the 35 weeks of lay-off, that is prior to the time at which his employment would have been deemed terminated under the *Employment Standards Act* and he would have been entitled to elect to receive termination/severance pay.

7. The company initially recalled the applicant for two weeks but the recall was repeatedly extended. On June 7, 2007 the applicant was advised that he would be laid off on August 17, 2007. On June 3, 2007 the applicant elected to take a "preferred lay-off" under the collective agreement and resigned his employment. He sought the payment of 11.1 weeks of severance pay and 8 weeks termination pay. The Company took the position that as a preferred lay-off is a voluntary lay-off it did not count as a lay-off for the purposes of the *Employment Standards Act.*

8. The responding party filed a grievance on the applicant's behalf. The responding party then sought legal advice regarding the applicant's entitlement to termination/severance pay. The opinion provided was that the applicant's grievance would likely not succeed. That opinion is before me. Based on that advice the responding party decided not to proceed to arbitration with the grievance.

9. The union wrote the following to all employees with respect to its position:

> August 1, 2007
>
> **TO THE MEMBERSHIP**
>
> Dear Gentlemen:
>
> This month I would like to enlighten you about a matter that seems to be surrounded by uncertainty. I hope this will clear up any misunderstandings.
>
> It seems that employees are of the understanding that an employee may elect to take a preferential layoff and use those weeks towards gaining eligibility for severance. When the TPEA first learned of this, we launched our own investigation.
>
> We first went to our "Ontario Employment Standards Act Manual" for clarification. Once everyone had a chance to read it, we collectively met to discuss the procedure and came to the same conclusion. It is our understanding that an employee cannot gain eligibility for severance by electing to take a preferential layoff.
>
> Our investigation furthered by contacting the Ontario Ministry of Labour. The response from The Ministry was clouded at best and after several phone conversations. I finally contacted a Mr. George Claire, Regional Director for the Ministry of Labour.

> Once again, his response was unclear and when I asked for his supervisor, I was put through to Ms. Giselle Nichols, who holds the title of Provincial Director. After an hour of conversation, we had discussed the Articles and Letters of Understanding in our Collective Labour Agreement, as well as the sections of the ESA Manual that pertain to this matter.
>
> In conclusion, Ms. Nichols opinion is, an employee who elects to take a preferential layoff is not eligible to use these weeks towards severance weeks.
>
> We still had one more avenue to explore! The TPEA contacted Ms. Sean Fitzpatrick who is our Legal Counsel. We gave Sean all the particulars and asked him to investigate and report back. After a few weeks, Sean returned with his report. His conclusion was the same as what Ms. Nichols had dictated to me. A written report soon followed (see attached copy).
>
> It is hoped that this may clear up any confusion that may have occurred.
>
> Thank you,
>
> "Ben Benard"
> President
> TPEA

10. The applicant contacted the Ministry of Labour. He was advised that a preferred lay-off did constitute a lay-off under the *Employment Standards Act*. The union's counsel was made aware of this advice and counsel discussed the issue further with the Ministry. The Ministry ultimately gave different advice to counsel than it had to the applicant.

11. Following his lay-off, the applicant spent some time trying to get the union to pursue a grievance on his behalf. He alleges that he made frequent calls to the union; but those often went unreturned.

Decision

12. Section 74 of the Act states:

> **74.** A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

13. Unions are not required to take to arbitration every grievance which employees file. They are entitled to evaluate the merits of the grievance, among many other factors, in order to decide whether to pursue a grievance. In *Perino Smith*, [1991] OLRB Rep. July 912 the Board made the following comments regarding the obligations imposed on the union:

> The Board has made it clear in many cases that what is required of a union in relation to a decision on whether or not to take a grievance to arbitration is that it turn its mind

> to the problem and consider it in a manner free from irrelevant considerations and arbitrary, discriminatory or bad faith behavior.

14. Furthermore, it is not enough for an applicant to assert that the trade union was wrong in its decision. It must demonstrate that the union was arbitrary, discriminatory or acting in bad faith when it made the decision not to pursue a grievance. In *Chrysler Canada*, 1997 O.L.R.D. No. 2605 the Board wrote:

> 36. Honest mistakes, errors in judgement, and innocent misunderstandings do not constitute conduct which is prohibited by section 74. Nor does the fact that the Board (or some other labour relations expert) might have arrived at a different conclusion necessarily suggest a breach of the duty of fair representation by a trade union. A trade union's approach or decision(s) with respect to a grievance or a proposed grievance must be more than merely "wrong": it must be arbitrary, discriminatory or in bad faith.
>
> 37. There is a great deal of Board jurisprudence which deals with the duty of fair representation, both generally and specifically with respect to the meaning of the words "arbitrary", "discriminatory" and "in bad faith". I find it unnecessary to engage in a lengthy analysis or review of that jurisprudence. Suffice to say that:
>
> (a) "arbitrary" means conduct which is capricious, implausible or unreasonable, often demonstrated by a consideration of irrelevant factors or a failure to consider all relevant factors;
>
> (b) "discriminatory" is broadly defined to include situations in which a trade union distinguishes between or treats employees differently without a cogent reason or labour relations basis for doing so;
>
> (c) "bad faith" refers to conduct motivated by hostility, malice, ill-will, dishonesty, or improper motivation.

15. There is no allegation of discrimination. The applicant does allege that the union's decision was wrong and arbitrary. The union was faced with a fairly difficult legal issue: whether an employee who asks to be laid off in accordance with the collective agreement is on a lay-off for the purposes of the *Employment Standards Act*. The applicant does not deny that the union both filed a grievance and sought legal advice from counsel and the Ministry of Labour with respect to the issue. There is no suggestion that the union's counsel considered irrelevant information or did not have all the facts before him when he gave his advice which was that the union would lose at arbitration.

16. It is clear that the advice given to the union by its lawyer was rational and plausible. It makes perfect sense that an employee who chooses to be laid off might not be permitted to benefit from that choice. However, there is merit to the applicant's argument as well.

17. It is a difficult issue. It is not necessary for me to decide as a matter of law whether the advice given to the union was right or not. What is clear, is that the advice that was not so wrong (if it was wrong) so as to be arbitrary.

18. The applicant's allegations of bad faith stem primarily from the way it is alleged the union dealt with him before and after the grievance was filed. The applicant detailed his efforts to obtain

the union's assistance in pursuing his grievance. If the allegations are true, the Board can understand the applicant's frustration; it might be possible that if true, that conduct might constitute a violation of section 74 of the Act. However, even if that was true, the applicant is no longer an employee of the company and a finding of a violation of the Act would serve little practical purpose. The Board exercises its discretion not to inquire into these allegations.

19. Based on the materials filed by the applicant, it is apparent that the union did not act in a way which is arbitrary, discriminatory or in bad faith. It filed a grievance on the applicant's behalf and sought a legal opinion regarding the chances of success of the grievance. When it was advised that the union would likely not be successful at arbitration it withdrew the grievance. Accordingly, the union engaged in a rational course of conduct and did not violate the Act.

20. This application is dismissed.

1621-08-R; 1622-08-R Canadian Union of Public Employees, Applicant v. **Sodexo Canada Limited**, Responding Party v. Labourers International Union of North America, Local 837, Intervenor

Bar – Certification – Representation Vote – The employer and incumbent trade union took the position that the application for certification was barred because CUPE had applied seven weeks earlier for the same units – In the first set of applications the Board ordered a vote (sealing the ballots), but questioned whether there was an appearance of 40% because of undated cards – CUPE wrote requesting that the first applications be dismissed and the Board took this as a concession that there was not an appearance of more than 40% – The Board found no bar applicable to the present application since: the votes were not counted (a condition under s. 10); section 7(10) [withdrawal after a vote] did not apply, as the vote was a nullity since there was no evidence of an appearance of 40% – Additionally, since the employees' wishes had never been tested, and there have been no repetitious withdrawals, there was no reason to exercise the Board's discretion to bar the applicant – Matter continues

BEFORE: *Brian McLean*, Vice-Chair.

DECISION OF THE BOARD: December 2, 2008

1. These are displacement applications for certification. They were filed on August 22, 2008 and were the second set of such applications for the same groups of employees made by the applicant ("CUPE") within a 7-week period. Both the responding party ("Sodexo") and the intervenor ("LIUNA") took the position that the Board should refuse to consider these applications or that they should be "barred".

2. By decision dated August 27, 2008, the Board directed that representation votes be held in the applications, but that the ballot boxes be sealed pending adjudication of the bar requests. The parties have filed written submissions on the question of the bar. There is no objection to the Board determining the bar issue on the basis of the written submissions.

3. The Board has reviewed the parties' submissions, and is of the view that the applications are not barred by the Act, and that this is not an appropriate case for the Board to impose a bar in the exercise of its discretion.

The Facts

4. CUPE previously applied to displace the incumbent intervenor as bargaining agent in each of these bargaining units (Board File Nos. 1058-08-R and 1059-08-R). By decision dated July 8, 2008 (amended by decision dated July 9, 2008) the Board (differently constituted) ordered votes but questioned whether the membership evidence submitted by CUPE established an appearance that at least 40% of the employees in the bargaining unit had applied to become members of CUPE in circumstances where the membership cards submitted did not comply with the Board's Rules of Procedure (because they were undated). The ballot box in the representation vote in the first applications were sealed. CUPE wrote to the Board on August 5, 2008 requesting that the first applications be dismissed. By decision dated August 13, 2008, the Board construed CUPE's actions as a concession that its evidence supplied with the applications did not demonstrate an appearance of 40% support by the employees in the affected bargaining units, and the Board dismissed the first applications on that basis without counting the ballots. The Board stated:

> 9. In these circumstances, the Board is prepared to dismiss the applications because the membership evidence filed by the applicant did not comply with the Board's Rules of Procedure; and as a consequence, it appears to the Board on an examination of only the information provided in the applications and the information and membership evidence filed by the applicant that less than forty per cent of the individuals in the bargaining units proposed by the applicant were members of the union at the time the applications were made.
>
> 10. The applications are dismissed.
>
> 11. The Board is not, however, prepared at this time to impose a bar pursuant to subsection 111(2)(k) of the Act. Should an application for certification be filed by the applicant within one year of the date of this decision, the effect, if any, of this decision and subsection 111(2)(k) of the Act on that subsequent application may be determined if necessary at that time.

I note that in *Norfolk General Hospital Laboratory v. OPSEU* 2002 CanLII 25772 (Apr. 4, 2002) the Board dismissed a termination application where "statements of desire" not to be represented by the trade union filed with the application were undated.

5. In requesting that the Board dismiss the applications because of the shortcomings in the membership evidence contrary to the Board's Rules of Procedure and the applicant's failure to meet the requirements of section 8 of the Act, the applicant appears to concede that it did not enjoy the apparent support of forty per cent or more of the individuals in each of the applicant's proposed bargaining units. Accordingly, the applicant ought not to have obtained the benefit of representation votes. The intervenor agrees with that position, and it would appear that the responding party too agrees with the position of the applicant.

6. The votes cast in respect of the first applications were never counted. Those applications were not dismissed, therefore, on the basis of the vote results. Consequently, the statutory bar set out

in section 10(3) of the *Labour Relations Act, 1995* ("the Act") is not engaged in these circumstances. These applications (Board File Nos. 1621-08-R and 1622-08-R) are not subject to a statutory bar. Section 10(3) of the Act only applies where an application for certification is "dismissed under this section", and section 10 pertains to the consequences of vote results:

> **10.** (1) The Board shall certify a trade union as the bargaining agent of the employees in a bargaining unit that is determined by the Board to be appropriate for collective bargaining if more than 50 per cent of the ballots cast in the representation vote by the employees in the bargaining unit are cast in favour of the trade union.
>
> (2) The Board shall not certify the trade union as bargaining agent and shall dismiss the application for certification if 50 per cent or less of the ballots cast in the representation vote by the employees in the bargaining unit are cast in favour of the trade union.
>
> (3) If the Board dismisses an application for certification under this section, the Board shall not consider another application for certification by any trade union as the bargaining agent of any employee that was in the bargaining unit proposed in the original application until one year after the original application is dismissed.

7. Where a certification application is dismissed because the applicant has not furnished evidence of support by at least 40% of the employees in its proposed bargaining unit, this normally occurs without any representation vote being ordered. In those circumstances, the Act does not specify that there is a bar, and the Board has not, to my knowledge ever exercised its discretion to impose one in those circumstances. Furthermore, where a representation vote is held, but an application is dismissed pursuant to an 8.1 objection, that is, because the applicant did not provide evidence of support by at least 40% of the employees in the appropriate unit, the statute specifically provides that a subsequent application is not barred. See section 8.1 (5) ¶7 and s. 10(4).

8. A certification application that is withdrawn after a representation vote has been taken is barred by section 7(10) of the Act, but this section has no application in these circumstances as the first applications were dismissed by the Board and the first representation votes should not have been held. In effect, the first representation votes were a nullity because the applicant did not have the requisite 40% support to be entitled to a vote. The Board cannot rely on undated cards to order a vote.

9. The remaining question before me, therefore, is whether I should exercise my discretion pursuant to section 111(2)(k) to bar these applications.

10. I see no reason to do so. The wishes of the employees have not been tested; the applicant withdrew the first applications only because of deficiencies in the membership evidence which were not spotted by the applicant prior to the vote. While the Board's practice is to bar applicants who repeatedly apply for certification and withdraw, generally that practice only applies where or when there are more than (three or more) such instances or the applicant is acting abusively. Those circumstances are not present in this case. In my view the wishes of the employees ought not to be frustrated because of the mistake by the union even if the union persisted in advancing its first applications despite its mistake.

11. These matters are referred to the Director of Field Services so the ballots can be counted.

1967-08-R Labourers' International Union of North America, Ontario Provincial District Council, Applicant v. **Weathertech Restoration Services Inc.**, Responding Party

Certification – Construction Industry – Practice and Procedure – The Board provides reasons for the acceptance a late-filed response to an application for certification – The applicant filed two very similar applications for certification with the responding party in close proximity; the responding party asserted that it did not receive the first application, and thought the hard copy material it received was a re-sending of the first application, when in fact it was a second application; nothing on the face of the new material identified for the responding party that this was a fresh application – The Board surveys its own case law, beginning with *Air Kool*, gives consideration to the court decisions in *Maystar*, and surveys other court rulings on the interpretation of "shall" – The Board concludes it is not bound by the Divisional Court's decision in *Maystar* because the Court of Appeal explicitly invited the Board to reconcile its jurisprudence – In considering whether it has the discretion to accept a late-filed response, the Board finds that an interpretation of the word 'shall' as directory in nature: (1) is consistent with and best ensures the attainment of the purposes of the Act; (2) eliminates the unintended consequences that result from concluding that the word is mandatory; (3) is consistent with establishing a common meaning for both the English and French texts of the Act; and (4) is consistent with the principles of natural justice – The Board finds that the responding party committed an innocent error in not recognizing that the applicant had filed two applications for certification, and the responding party acted promptly in rectifying the error once it learned of the true situation – Late response allowed

BEFORE: *Lee Shouldice*, Vice-Chair.

DECISION OF THE BOARD; November 20, 2008

Introduction

1. This is an application for certification filed under the construction industry provisions of the *Labour Relations Act, 1995*, S.O. 1995, c. 1 as amended (the "Act") that the applicant elected to have dealt with under section 128.1 of the Act.

2. This application was filed with the Board in accordance with the Board's Rules of Procedure on September 25, 2008, and was delivered to the responding party by the applicant by way of hand delivery on September 29, 2008. The response to the application was due to be delivered to the applicant and filed with the Board no later than October 1, 2008, in accordance with Rule 25.5 of the Board's Rules of Procedure and subsection 128.1(3) of the Act.

3. The response filed by the responding party was delivered to the applicant and filed with the Board at approximately 4:00 p.m. on October 2, 2008. The responding party included with its response a Schedule "B" that explained the reasons for the late delivery of the response and requested that the Board exercise its discretion to consider the information contained in the response.

4. By way of decision dated October 3, 2008, the parties were directed to file written submissions regarding the responding party's request that the Board consider its late-filed response. Those submissions were filed with the Board, and on October 10, 2008 a "bottom line" decision was released advising the parties that the Board would exercise its discretion to consider the late-filed information contained in the response. These are the reasons for that decision.

The Late Filing of the Response

5. The factual circumstances that gave rise to the late filing of the response by the responding party begin with two applications for certification relating to the responding party that were filed by the applicant with the Board on Tuesday, September 23, 2008 and Thursday, September 25, 2008.

6. On Thursday, September 25, 2008, at 4:43 p.m., two representatives of the applicant attended at the business address of the responding party in order to deliver the documentation required by the Board to be sent to responding parties to a construction industry certification application in accordance with the Board's Rules of Procedure (the "first application for certification"). The first application for certification had been filed with the Board by way of Canada Post Priority Courier on Tuesday, September 23, 2008, was received by the Board on Thursday, September 25, 2008, and was given Board File No. 1944-08-R. The applicant was required by the Board's Rules to deliver the first application for certification to the responding party no later than 5:00 p.m. on September 25, 2008. The applicant states that when its two representatives attended at the business address of the responding party and tried to open the door, they found it to be locked. The two representatives left the complete application package in the responding party's mailbox at that time, and then left.

7. On Friday, September 26, 2008, at approximately 11:24 a.m., the Board forwarded to the responding party a "Confirmation of Filing of Application for Certification, Construction Industry" (Form B-59) relating to the first application for certification. There is no dispute that at some point that same morning, one of the two representatives of the applicant who left the complete application package relating to the first application for certification in the responding party's mailbox the prior afternoon contacted the responding party to advise that he had done so. Although there is undoubtedly a dispute regarding the content of the discussion between the two individuals at that time, the responding party does not dispute the applicant's assertion that Mr. Bogart, the responding party's President, spoke with the applicant's representative and did not during that discussion assert that he had not received the first application for certification or that he did not know to what the applicant's representative was referring. The responding party asserts that it searched every mailbox that the first application for certification could have been placed in, but did not locate it.

8. At approximately 3:00 p.m. on Friday, September 26, 2008, counsel for the responding party wrote to the Board seeking a copy of the first application for certification. In his correspondence, he states that his client had received the Confirmation of Filing form but had not received a copy of the first application for certification. There does not appear to be any dispute that on that same day counsel for the responding party contacted counsel for the applicant and requested that he be provided with a copy of the first application for certification, and that counsel for the applicant subsequently arranged for a copy of the first application for certification to be sent to counsel for the responding party on Sunday, September 28, 2008. The responding party's response to the first application for certification was due on Monday, September 29, 2008.

9. On Monday, September 29, 2008, at approximately 1:04 p.m., the Board delivered to the parties an Amended "Confirmation of Filing of Application for Certification, Construction Industry" (Form B-59) relating to the first application for certification. It appears that the initial form delivered to the parties identified an incorrect application filing date on the face of the document. Later that same day, at approximately 4:30 p.m., a representative of the applicant attended at the premises of the responding party and provided Mr. Bogart with an envelope containing a complete package relating to the instant application for certification (the "second application for certification"). The applicant states (and the responding party does not appear to dispute) that the first document within the package was a completed Form C-32, "Notice to Employer of Application for Certification, Construction Industry".

10. The responding party states that Mr. Bogart opened the envelope, saw the second application for certification, understood it to be a copy of the first application for certification that he had not previously received, and filed it with the rest of the documents relating to the first application for certification. Shortly after Mr. Bogart was provided with the envelope containing the second application for certification, counsel for the responding party delivered to counsel for the applicant and filed with the Board the responding party's response to the first application for certification.

11. The second application for certification, Board File No. 1967-08-R, had been filed with the Board by way of Canada Post Priority Courier four days earlier on Thursday, September 25, 2008. The Board's Rules of Procedure require that the second application for certification had to be delivered to the responding party no later than 5:00 p.m. on September 29, 2008. The applicant effected that delivery by having its representative hand the envelope to Mr. Bogart on September 29, 2008 at 4:30 p.m.

12. On Tuesday, September 30, 2008, at approximately 12:30 p.m., the "Confirmation of Filing of Application for Certification, Construction Industry" (Form B-59) with respect to the second application for certification was sent to the responding party.

13. On Wednesday, October 1, 2008, Mr. Bogart received a call from a clerk of the Board, which he understood to be related to the first application for certification. The responding party also received a decision of the Board dated October 1, 2008 relating to the first application for certification. Mr. Bogart returned to the Board a completed Form A-76, Confirmation of Posting form. The Confirmation of Posting form returned by Mr. Bogart had been sent to him the prior day, and related to the second application for certification. Of significance, on the face of the Confirmation of Posting form returned to the Board Mr. Bogart identifies that he had received copies of certain forms for posting, as well as a decision of the Board, and had posted the forms and the decision. By that time, the only decision that had issued in either of the two applications for certification was the decision of the Board in the first application for certification dated October 1, 2008. Notwithstanding that the Confirmation of Posting sent to the responding party on September 30, 2008 related to the second application for certification, Mr. Bogart clearly appears to have believed that it related to the first application for certification.

14. It is not entirely clear from the materials filed with the Board when the responding party first realized that there were two applications for certification in play. However, the responding party ultimately delivered and filed its response in the instant proceeding, the second application for certification, by 5:00 p.m. on Thursday, October 2, 2008.

15. There appears to be no dispute that the responding party has a mature bargaining relationship with the International Union of Bricklayers and Allied Craftworkers, and that Mr. Bogart has appeared before the Board since 1998 in his capacity as an employer. During the course of the past two years, Mr. Bogart has been involved in protracted litigation before the Board.

Submissions of the Parties

16. In these circumstances, the responding party argues that the Board has discretion under subsection 128.1(3) of the Act to consider the information contained in the response filed with the Board on October 2, 2008. Citing the decision of the Divisional Court in *Maystar General Contractors v. International Union of Painters and Allied Trades, Local Union 1819*, [2007] O.J. No. 1067 (Mar. 20, 2007) ("*Maystar*"), the responding party asserts that the Board has discretion under subsection 128.1(3) of the Act to consider the names of the employees in the bargaining unit proposed in the application as of the date the application is filed, even if such names are provided more than two days after the notice of election pursuant to subsection 128.1(1) is received from the applicant. Relying upon the decisions of the Board in *Reids Uptown Homes*, [2007] OLRB Rep. May/June 633 (May 16, 2007) and *Carman Construction Inc.*, [2008] OLRB Rep. January/February 1 (Jan. 8, 2008), the responding party states that the Board must carefully weigh all of the circumstances before it in order to determine whether it is appropriate to exercise its discretion to relieve against the late filing of a response. The responding party states that no one factor ought to be determinative, but that of primary importance are the reasons offered by the responding party for the delay. Relying upon *Lomax Management Inc.*, [2008] OLRD No. 82 (Jan. 9, 2008), the responding party states that the Board has also considered as factors the period of the delay and the union's ability to investigate and mount a challenge to the information provided.

17. In this case, the responding party submits that given that it did not receive a copy of the first application for certification, it was reasonable for the responding party to have believed that the delivery of the second application for certification was in fact delivery of the first application. It states that both documents look remarkably similar and notes that on the applications delivered by the applicant there are no Board File numbers to distinguish the two documents. The applicant did not dispute the assertion by the responding party that both documents looked "remarkably similar".

18. Counsel for the responding party also submits that the responding party was unfamiliar with the certification process, and therefore that it was not at all unreasonable for the responding party to have confused the two applications and not understood its obligations with respect to the second application. Counsel also notes that by the time the second application for certification was delivered by the applicant, the applicant was aware that the responding party had retained counsel on the first application for certification, yet did not provide him with a copy of the second application for certification. Counsel also points out that, notwithstanding that union counsel communicated with him regarding delivery of a copy of the first application on Friday, September 26, 2008 and Sunday, September 28, 2008, union counsel did not advise him that a second application had been filed with the Board.

19. The responding party states that the late filing of the response was due to a mix-up caused by innocent error, asserts that but for the circumstances it would have filed a timely response, and notes that it acted quickly upon learning the actual situation. It also notes that the second application for certification identifies a majority of the sites the response identifies in Board Area No. 3 on the

application filing date (and, therefore, presumably that the applicant was not significantly prejudiced by the one day delay), and that the applicant has not asserted any specific prejudice in its submissions.

20. In response to these submissions, the applicant states that although the facts alleged by the responding party might be sufficient to cause the Board to exercise its discretion to accept a late response in other circumstances, in the instant application the responding party is misleading the Board. As a result, it asserts that the Board ought not to exercise its discretion to accept the responding party's late response.

21. In that respect, counsel for the applicant states that after leaving the first application for certification in the mailbox of the responding party on Thursday, September 25, 2008, the applicant's representative contacted Mr. Bogart the next morning to advise him of that fact. As noted above, Mr. Bogart does not assert that he stated at that time that he had not received the document, or that he did not know what the representative was talking about. The applicant asserts that Mr. Bogart threatened its representative with bodily harm during the course of their discussion. These threats comprise a portion of an unfair labour practice complaint filed with the Board on October 8, 2008 (Board File No. 2083-08-U). The applicant asserts that the responding party did receive the first application, and given the responding party's misrepresentation to the Board, that it ought to be precluded from relying upon the information contained in its late response.

The Board's Jurisprudence on the Exercise of Discretion

22. In *Maystar*, (2006) CanLII 30477 (Sept. 6, 2006), the Board determined that it had no jurisdiction to extend the two day time limit contained in subsection 128.1(3) of the Act for the filing of the names of the employees in the bargaining unit. The decision of the Board in *Maystar* was based principally upon the prior decision of the Board in *Air Kool Limited*, [2005] OLRB Rep. July/August 525 (Aug. 17, 2005), in which the Board determined that subsection 128.1(3) of the Act did not provide the Board with such jurisdiction. Accordingly, the Board in *Maystar* refused to consider the employer's late-filed list of employee names. Based on the list of names provided by the trade union, the Board determined that the union had a sufficient level of membership support to be certified and issued certificates to the union.

23. The employer applied for judicial review, asserting that the Board had incorrectly determined that it could not consider the late-filed list of employee names. The Divisional Court determined that the Board's decision was subject to review on the standard of "correctness" and concluded that the Board's decision was not correct because the obligation established by subsection 128.1(3) of the Act was directory and not mandatory. As a result, the Divisional Court concluded that the Board could consider the late-filed list of employee names. The Board's decision was set aside, and the matter was remitted back to the Board for reconsideration in light of the Court's reasons for judgment. Upon reconsideration, the Board determined that it would consider the late-filed list of employee names and, upon doing so, found that the union did not have a sufficient level of membership support to be certified. The certificates previously issued to the union were revoked.

24. Subsequent to the decision of the Divisional Court, the Board has had occasion to issue decisions identifying various factors it will take into account in exercising its discretion to consider late-filed information (see, for example, *Gagnon Demolition Inc.*, [2007] OLRB Rep. March/April 358 (Apr. 11, 2007), *Kralik Electrical Services*, (2007) CanLII 13228 (Apr. 13, 2007), *Reids Uptown Homes*, cited above, *Mega Painting & Décor* (2007) CanLII 29087 (July 20, 2007), *Struct-Con*

Construction Ltd., [2007] OLRB Rep. July/August 810 (July 23, 2007), and *Greenleaf Homes*, (2007) CanLII 35638) (Aug. 23, 2007). To date, the most extensive discussions regarding the circumstances in which the Board will exercise its discretion to consider late-filed information are contained in the Board decisions relied upon by the responding party - *Reids Uptown Homes* and *Carman Construction Inc.*

25. In *Reids Uptown Homes*, the employer filed a response with the Board five days after the date prescribed by the Board's Rules of Procedure, without a particularly cogent explanation for the delay in responding other than that a representative of the responding party was not in the office to review the materials that were delivered to it by the union by way of facsimile. The Board reviewed the circumstances under which it would consider the late-filed information of an employer, and identified some of the factors it would consider in deciding whether to exercise its discretion to do so.

26. One of the factors to be considered by the Board is the circumstances surrounding the failure of the responding party to file a timely response. After noting that each case must be decided on its own merits, the Board identified a number of considerations that might be relevant in any given case:

(a) the reasons for the failure to file a response in a timely fashion;

(b) whether the union had actual notice of the employer's position;

(c) the conduct of the union - whether it contributed to the employer's delay, or whether it misrepresented (innocently or deliberately) an important matter to the Board;

(d) whether there is any history of dealing between the employer and the applicant union that is relevant to the issue of the employer's lateness in filing the application;

(e) whether the employer acted quickly on learning of the true situation.

The Board noted in its decision that the first issue to be examined relates to the delivery of the application and the reasons for the failure to observe the statutory time limits. If the responding party cannot demonstrate that it tried to provide the information required by subsection 128.1(3) or was prevented from doing so, the panel of the Board in *Reids Uptown Homes* was of the view that it is unlikely that other issues would be of significance.

27. The Board discussed other factors that might be considered when exercising its discretion under subsection 128.1(3) of the Act. One of those factors is the factor of prejudice. At paragraphs 29 to 32 of the decision, the Board discusses the concept of prejudice and its significance to the exercise of the Board's discretion when responses are delivered beyond the time set out in this subsection. The Board makes the following observations at paragraphs 31 and 32 of its decision:

> 31. Even where a union has information about a particular job site, the significance of specific individuals and the specific work they were doing is not necessarily apparent until an issue is raised by an employer. The possibility of lost or ignored evidence arises even over a short period of time. In addition, and particularly in

> circumstances where a union is faced with a suggestion that there were more employees than they were aware of or believed to be at work, or the existence of an alleged job site of which they were unaware, the ability to ascertain accurate information about the factual basis for the employer's position diminishes by the hour. A delay of even one or two days increases this difficulty. The ease with which a person working on a construction site will be able to determine who he or she was working with and what tasks were accomplished on an otherwise unremarkable working day falls off with surprising rapidity.
>
> 32. The prejudice then is real, even in the context of the very short time limits that prevail in certification applications. What is perhaps even more significant is that this prejudice will be the same in every case. Any decision to consider late-filed information (except in cases such as *Maystar General Contracting Inc., supra*, where the union in fact had the information) will always involve prejudice, and the same kind of prejudice, to the union. That suggests an even greater focus on the reasons for the employer's failure to provide the information to the Board in a timely fashion.

28. The Board concluded its analysis by stating that how these or any other factors will be applied will be determined by the facts of cases as they actually arise.

29. In *Carman Construction Inc.*, cited above, the Board dealt with a situation that was roughly similar to the instant case – multiple applications for certification filed with the Board at or around the same time. The Board started its analysis from the proposition that the two day statutory standard established by subsection 128.1(3) of the Act is expected to be met by a responding party in every case.

30. The Board noted that the Divisional Court had indicated in its reasons in *Maystar*, cited above, that the Board has the discretion to consider late-filed information, having regard to the wording of subsection 128.1(3) of the Act. As a result, it concluded that where the responding party to an application for certification files a late response with the Board, the Board must determine in every case whether it will consider the information about the bargaining unit description and the identity and number of persons in the bargaining unit that is contained within that response.

31. The critical passage of the Board's decision in *Carman Construction Inc.*, cited above, is found at paragraphs 22 to 26:

> 22. In my view, the primary obligation of the Board in any given case is to carefully weigh all of the circumstances before it in order to determine whether it is appropriate to exercise its discretion to relieve against the late filing of a response, and to consider the information contained therein relating to subsection 128.1(3) of the Act.
>
> 23. The Board's jurisprudence to date reflects that no one factor is determinative, and that there is an evolving set of factors. Although all of the circumstances surrounding the failure by the responding party to file a timely response will be considered by the Board, of primary importance to the Board will be the reasons offered by the responding party for the delay in delivering the response. As noted above, a responding party to an application for certification is expected to file its response within the two-day time limit reflected by section 128.1(3) of the Act. As a result, an employer that requests the Board to exercise its discretion to consider the information contained in a late-filed response will in the normal course be expected to persuade the Board at the same time that it files its response that there is a legitimate

> reason for the delay in responding. An employer that requests that the Board exercise its discretion in these circumstances should provide the Board and the applicant with the reason or reasons for the delay in delivering the response, a full and detailed statement of the material facts upon which it relies to support its request, and include any documentation that supports its position.
>
> 24. In assessing whether the responding party has provided a legitimate reason for the delay in responding to the application, the Board will consider whether the responding party attempted to deliver and file a timely response (but for some reason beyond its control could not do so), whether the late filing was due to an innocent error, and whether but for the circumstances facing the responding party it can objectively be concluded that the responding party likely would have filed a timely response in the normal course.
>
> 25. Although it is of primary significance to the Board, the reason for the delay is not the only factor that will be taken into account by the Board, nor will it be singularly determinative of the request made by the responding party. Other factors are also of considerable significance, such as whether the union contributed to the employer's delay or whether the responding party responded immediately after becoming aware of the situation. In addition, the Board will consider how long beyond the two-day statutory time frame the responding party actually delivered and filed its response. In that regard, the extent to which the applicant is prejudiced by the failure of the responding party to file a timely response is a critical factor that must be weighed by the Board in every case. In *Reids Uptown Homes*, the Board noted that it can be very difficult for a union to ascertain with any degree of certainty the accuracy of the factual basis for the position being taken by an employer as time progresses beyond the initial two-day time period for filing a response to an application for certification. The applicant in this proceeding relies upon the passage at paragraph 32 of *Reids Uptown Homes* for the proposition that the prejudice to a union as a result of a late-filed response will be the same in every case and will always involve prejudice, and the same kind of prejudice.
>
> 26. The prejudice to a union as a result of a late-filed response will depend upon the circumstances of each case. In certain cases, there may be little prejudice, if any, to a union resulting from a short delay in delivering and filing the response – see, for example, both *Maystar* and *Gagnon Demolition Inc.*, cited above, where the union had actual notice of the employer's position. That said, the Board's experience allows it to take administrative notice of the fact that the ability of a union in the construction industry to ascertain accurate information about the factual basis for a responding party's position – particularly when the union is alleged to have underestimated the number of employees in the bargaining unit - diminishes rapidly as time progresses, and that delays of even one or two days may well lessen this ability in a meaningful way.

32. At the same time that Board jurisprudence was developing respecting the exercise of the Board's discretion, the decision of the Divisional Court in *Maystar* was appealed to the Ontario Court of Appeal (reported at (2008), 90 O.R. (3d) 451). Two issues were raised by the appeal – first, whether the Divisional Court had erred by applying the "correctness" standard of review, and second, whether the Divisional Court had erred when it concluded that the Board's interpretation of subsection 128.1(3) of the Act was incorrect.

33. The Court of Appeal determined to not decide the appeal on the merits. The Board had reconsidered its decision after the ruling of the Divisional Court and had revoked the certificates, thus rendering the appeal moot. In the course of providing its reasons for decision on the question of whether the Court would exercise its discretion to decide the appeal notwithstanding the mootness of the issues in dispute, Gillese J.A. made the following observations at paragraphs 42 to 44 of her reasons:

> [42] I conclude, however, with the following caution. Nothing in these reasons should be taken as affirming the Divisional Court's view that the appropriate standard of review of the Board Decision was correctness and that no deference was owed to the Board in its interpretation of the relevant certification provisions in the *LRA*. The decisions of the Supreme Court of Canada, over the course of many decades, show an unbroken commitment to affording labour relations boards the highest levels of judicial deference on matters within their exclusive jurisdiction. See, for example, *Canadian Union of Public Employees Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227, [1979] S.C.J. No. 45, *Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941, [1993] S.C.J. No. 35 and *Royal Oak Mines Inc. v. Canada (Labour Relations Board)*, [1993] 1 S.C.R. 369, [1996] S.C.J. No. 14. Issues which arise in implementing the *LRA* provisions governing the certification process in the construction industry are such matters.
>
> [43] In the nomenclature of old, Board decisions were not to be set aside unless they were patently unreasonable or clearly irrational. *Dunsmuir v. New Brunswick*, [2008] S.C.J. No. 9, 2008 SCC 9, has simplified the standard of review analysis with the result that there are now only two standards of review: correctness and reasonableness. However, both the result and the reasoning in *Dunsmuir* affirm a continuing stance of deference in the field of labour relations. In *Dunsmuir*, a standard of reasonableness was held to apply when reviewing the decision of an adjudicator made under the *Public Service Labour Relations Act*, R.S.N.B. 1973, c. P-25. The majority in *Dunsmuir* notes that an exhaustive analysis is not required in every case to determine the proper standard of review: if the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded a decision maker with regard to a particular category of question, the search for the appropriate standard is over. If not, then the usual factors are to be considered. Deference will "usually result" where a decision maker is interpreting its own statute, with which it will have particular familiarity. Deference is also warranted where the decision maker has particular expertise in the application of legal rules in a specific statutory context. The majority also noted that a question of law of central importance to the legal system as a whole and which is outside the specialized area of expertise of the decision maker will always attract a correctness standard. I do not see the Procedural Issue as raising a question of that nature.
>
> [44] Appreciating the need for deference on matters within the Board's exclusive jurisdiction further militates against deciding the present appeal on the merits. A decision on the Procedural Issue would require the court to analyze what appear to be two competing lines of Board authority and to perhaps accept one and reject the other. If nothing else, it would be foolhardy for this court to pre-emptively interpret complicated statutory provisions involving practices and procedures of which the court knows very little, before the Board has an opportunity to consider and, perhaps, reconcile those authorities. To embark on a review of the merits would require this court to do precisely what the jurisprudence indicates is improper – rather than defer to the Board, it would have this court dictate the process the Board is to follow when

> making decisions on certification, a matter within its exclusive jurisdiction. (footnotes omitted)

In essence, the Court of Appeal confirmed that the interpretation of the provisions of the Act governing the certification process in the construction industry are within the scope of the Board's exclusive jurisdiction, and that deference to those decisions will typically be given by the courts.

34. Decisions of many panels of the Board since the decision of the Court of Appeal in *Maystar* demonstrate that the Board has, for the most part, continued to adopt the conclusion reached by the Divisional Court that subsection 128.1(3) of the Act does not establish a mandatory time limit (see, for example, *Schickedanz Bros. Ltd.*, (2008) CanLII 29444 (June 4, 2008), *DeLuca Roofing Inc.*, (2008) CanLII 40683 (July 24, 2008), and *538203 Ontario Ltd., o/a Villa Construction*, (2008) CanLII 40954 (Aug. 6, 2008)).

Analysis

Is the Board bound by the decision of the Divisional Court in *Maystar*?

35. One issue that arises as a result of the judicial review and appeal of *Maystar* is whether the decision of the Divisional Court remains binding upon the Board. For the reasons that follow, I am of the view that the Board is not bound by the decision of the Divisional Court in *Maystar*.

36. It is evident from the decision of the Court of Appeal that that court did not reverse the decision of the Divisional Court. However, it is my view that the "caution" identified by the Court of Appeal in paragraphs 42 to 44 of its decision is a statement intended by the court to communicate its view of the applicable law. In adopting this view, I am guided by the Ontario Court of Appeal decision in *Ciba-Geigy Canada Ltd. v. Apotex Inc.* (1990), 75 O.R. (2d) 589. In that case, the appellant appealed to the Ontario Court of Appeal a decision of a motions court judge determining a point of law based upon what was alleged to be *obiter dicta* from a prior decision of the Court of Appeal. The Court of Appeal indicated that the passages that formed the basis of the order of the motions court were more than just *obiter dicta*, at page 591:

> As far as the appeal itself is concerned, we do not think that the statements of Mr. Justice Cory can be considered to be *obiter dicta* in the sense that they do not carry binding force. In our view, they were carefully considered statements which were intended by the court to declare the law applicable to that case and to govern the trial judge conducting the new trial. They are authoritative statements of the law.

37. In my view, the statements by the Court of Appeal in *Maystar* are similar "carefully considered statements which were intended by the court to declare the law". The Court of Appeal made reference to the decision of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, [2008] SCC 9. It noted that both the result and the reasoning in *Dunsmuir* confirmed the Supreme Court's "unbroken commitment to affording labour relations boards the highest levels of judicial deference on matters within their exclusive jurisdiction". The Court of Appeal noted that the Supreme Court in *Dunsmuir* confirmed that deference ought to "usually result" where a labour relations board interprets its own statute. The Court of Appeal characterized the question of the

proper interpretation of subsection 128.1(3) of the Act as one that is not a question of law of central importance to the legal system as a whole outside the specialized expertise of the Board, and therefore a question that did not "attract a correctness standard".

38. It is evident that the Court of Appeal has effectively communicated to the Divisional Court that the standard of "reasonableness" rather than the standard of "correctness" ought to be applied to decisions of the Board dealing with the proper interpretation of the Act, including subsection 128.1(3). While this does not constitute a reversal of the Divisional Court decision, it is a clear signal to the Divisional Court that it adjudicated the decision of the Board in *Maystar* with reference to an incorrect standard. Because the Divisional Court did not assess the decision of the Board in *Maystar* against the "reasonableness" standard, there is no higher court decision concerning the interpretation of subsection 128.1(3) of the Act that is binding upon the Board.

39. In addition, at paragraph 44 of its reasons for decision in *Maystar* the Court of Appeal notes that there are decisions of the Board relating to the interpretation of subsection 128.1(3) of the Act that reflect divergent views as to whether the Board can consider information that is contained in late-filed responses and, if so, the basis upon which any discretion to do so will be exercised. The Court states that if it were to decide whether the Divisional Court erred in holding that the Board's interpretation of subsection 128.1(3) of the Act was incorrect, it would be required to analyze two competing lines of Board authority and to potentially choose one over the other. Having regard to the expertise of the Board to "consider and, perhaps, reconcile those authorities", the Court of Appeal was hesitant to opine one way or the other upon its view of the decision of the Divisional Court in *Maystar*, because to do so "would require this court to do precisely what the jurisprudence indicates is improper – rather than defer to the Board, it would have this court dictate the process the Board is to follow …". It is evident that the Court of Appeal anticipates that the Board will reconcile its decisions. If the Court of Appeal were of the view that the decision of the Divisional Court was binding upon the Board, it would not have invited the Board to reconcile its jurisprudence.

Should the Board Return to the Reasoning Reflected by *Air Kool*?

40. The first question to address is whether subsection 128.1(3) of the Act limits the jurisdiction of the Board to consider information that is filed with the Board beyond the two day limit identified by the Act.

41. As noted above, the Board in *Maystar*, relying upon the prior analysis of the Board in *Air Kool*, concluded that the word "shall" in subsection 128.1(3) of the Act was mandatory in nature, rather than directory. Having determined that subsection 128.1(3) of the Act was mandatory in nature, the Board could not consider any information contained in materials that were filed with the Board beyond the statutory two day limit.

42. It is instructive to consider the analysis undertaken by the Board in *Air Kool*, because *Air Kool* is the foundation for the approach adopted by the Board in *Maystar*. In *Air Kool*, the Board analysed section 128.1 of the Act by reference to a passage of text found in Sullivan & Driedger, *Construction of Statutes* (Fourth Edition, 2002) (hereinafter "Sullivan & Driedger"). The Board stated, at paragraph 21, that:

> " … The primary focus of any examination of the 'mandatory-directory distinction' is whether there are statutory consequences if a party fails to comply. To use Sullivan

> and Driedger's vocabulary, the analysis centres on whether the breach can be "fixed or disregarded". That is, if the Board has the power to relieve against a breach, it may be cured in that way. Alternatively, if the failure to comply with the requirement does not have any consequences for the manner in which the statute operates, it does not matter whether or not it occurred".

The Board noted in *Air Kool* that there is nothing in the Act which expressly provides the Board with the authority to extend the time limits imposed by subsection 128.1(3) of the Act.

43. The Board continued with its analysis by concluding that there are "statutory consequences" should a responding party fail to do what subsection 128.1(3) of the Act says it shall do, because under subsection 128.1(4) of the Act the Board is required to determine the percentage of employees in the bargaining unit who are union members based on the applicant's materials and the information provided under subsection 128.1(3). If the information is provided to the Board beyond the two day time limit, the Board in *Air Kool* characterized that information as not being "provided under subsection (3)". Because the Board has no statutory authority to deem the late-filed information to be something other than what it is, the Board in *Air Kool* concluded that there are "significant consequences" attached to failing to comply with the time frame contained in subsection 128.1(3) of the Act – namely potential certification based solely on the materials filed by the union. The Board, repeating the vocabulary used by Sullivan & Driedger, stated that the Board did not have the authority to "fix" or "disregard" a failure to comply with the two day time limit when it comes to assessing the information under subsection 128.1(4) of the Act.

44. The Board augmented its analysis by relying upon the provisions contained in subsection 128.1(5) of the Act. The Board concluded that one can infer from the fact that the Legislature specifically advised the Board of the type of evidence that it can consider when making its assessment under subsection 128.1(4) of the Act that the Legislature recognized the narrow limits of subsection 128.1(4) of the Act and had given the Board "little discretion to act". The Board concluded that section 128.1 of the Act contained mandatory time limits for filing the information under subsection 128.1(3) of the Act.

45. The Board in *Air Kool* reviewed other provisions of the Act in order to establish that an extremely narrow interpretation of the Board's authority under subsection 128.1(3) of the Act was warranted. It also considered whether the interpretation it had adopted of subsection 128.1(3) of the Act fit within the objectives of the Act. Noting that "[t]he final test of the correctness of an interpretation is whether it fits with the general scheme and objectives of the Act that underlie the way it operates with respect to certification applications", the Board stated that its interpretation was consistent with the principle that "labour relations delayed is labour relations denied", particularly with respect to the certification process. The Board concluded that its interpretation of subsections 128.1(3) and (4) of the Act was "in keeping with the overall need for expedition expressed in the Act, and by the Board in its application of the Act".

46. In the result, the Board in *Air Kool* concluded that the directive contained in subsection 128.1(3) of the Act is mandatory. The Board determined that it had no authority to consider information that is filed with the Board beyond the two day limit contained in the Act.

47. For the reasons that follow, I am of the view that the approach adopted by the Board in *Air Kool* requires rethinking.

48. In the current edition of *Sullivan on the Construction of Statutes* (Fifth Edition, 2008), Professor Sullivan identifies certain interpretative principles that were described in a similar fashion in Sullivan & Driedger, and were set out in paragraph 20 of *Air Kool.* The text provides, at pages 74 and 75, as follows:

> When "shall" and "must" are used in legislation to impose an obligation or create a prohibition or requirement, they are always imperative. A person who "shall" or "must" do something has no discretion to decide whether or not to do it. A person prohibited from doing something is equally devoid of lawful choice. The issue that arises in connection with "shall" and "must" is not whether they are imperative, but the consequences that flow from a failure to comply. In some legislation, the consequences of failing to do what one is obliged to do (or not do) are clearly set out, but in other contexts the legislation is silent and it is left to the courts to determine whether non-compliance can be cured.
>
> If breaching an obligation or requirement imposed by "shall" entails a nullity, the provision is said to be mandatory; if the breach can be fixed or disregarded, the provision is said to be directory. The term "directory" is unfortunate in so far as it implies that "shall" is sometimes not imperative, that it sometimes has the force of a mere suggestion. The confusion is compounded when "mandatory" and "imperative" are used interchangeably - that is, when "mandatory" is used to indicate that a provision is binding or "imperative". These are distinct concepts. "Shall" and "must" are always imperative (binding); neither ever confers discretion. *But they may or may not be mandatory; that is, breach of a binding obligation or requirement may or may not lead to nullity.* The mandatory-directory distinction reflects the fact that there is more than one way to enforce an obligation.

The italicized portion of the passage set out above has been added by the author since the fourth edition of the text relied upon by the Board in *Air Kool.*

49. Immediately following the passage excerpted above, Professor Sullivan identifies three cases (one from the Judicial Committee of the Privy Council, and two relatively recent cases from the Supreme Court of Canada) that establish important principles of interpretation relating to what the author refers to as the "mandatory-directory distinction".

50. The first decision, said to be "the leading authority for many years" on the distinction between mandatory and directory provisions, is *Montreal Street Railway Co. v. Normandin*, [1917] A.C. 170. In that decision, Sir Arthur Channel wrote, at pages 174-175, that:

> "The question whether provisions in a statute are directory or imperative [i.e., mandatory] has very frequently arisen in this country, but it has been said that no general rule can be laid down, and that in every case *the object of the statute must be looked at … When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience, or injustice to persons who have no control over those entrusted with the duty, and at the same time would not promote the main object of the Legislature, it has been the practice to hold such provisions to be directory only*, the neglect of them, though punishable, not affecting the validity of the acts done." (emphasis added)

51. Two Supreme Court of Canada decisions are set out immediately after the *Montreal Street Railway* decision. They are of considerable importance to assessing the "mandatory-directory distinction". First, Professor Sullivan quotes Mr. Justice Iacobucci in *British Columbia (Attorney General) v. Canada (Attorney General)*, [1994] 2 S.C.R. 41, at paragraph 148, as stating the following:

> "[T]he court which decides what is mandatory, and what is directory, brings no special tools to bear upon the decision. The decision is informed by the usual process of statutory interpretation. *But the process perhaps evokes a special concern for "inconvenient" effects, both public and private, which will emanate from the interpretative result.*" (emphasis added)

Secondly, the text quotes Mr. Justice Gonthier as stating the following in *Blueberry River Indian Band v. Canada*, [1995] 4 S.C.R. 344, at paragraph 42:

> "This Court has ... held that the object of the statute, and the effect of ruling one way or the other, are the most important considerations in determining whether a directive is mandatory or directory." (emphasis added)

In fact, it was Madam Justice McLachlin (as she then was), and not Mr. Justice Gonthier, who wrote the passage set out directly above. She relied upon the prior decision of the Court in *British Columbia (Attorney General)*, cited above, for that principle.

52. The principles reflected by the two Supreme Court of Canada decisions identified above have been reiterated by the courts in recent years. In *M & D Farm Ltd. v. Manitoba Agricultural Credit Corp.*, [1999] 2 S.C.R. 961, Mr. Justice Binnie, for the court, provided the following summary of the law at paragraph 44 of the decision:

> "The distinction is well established between legislative provisions that are mandatory (in the sense that non-compliance results in invalidity) and directory (where non-compliance may in certain circumstances be relieved against): *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721 at p. 737. In determining whether a statutory directive is mandatory or directory, this Court must be guided by the object of the statute and the effects of ruling one way or the other: *British Columbia (Attorney General) v. Canada (Attorney General); An Act respecting the Vancouver Island Railway (Re)*, [1994] 2 S.C.R. 41, at pp. 123-24. Indeed, these are the most important considerations: *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 S.C.R. 344, per McLachlin J., at para. 42."

53. One question that arises from a review of the authorities identified above is whether the principles established by those cases are limited in their application to circumstances involving the performance of a public duty, as suggested by the excerpt from *Montreal Street Railway Co. v. Normandin*. In the instant proceeding, the obligation imposed upon the responding party is not a duty or obligation imposed upon a public officer, but one imposed by the Act upon a party to a private legal proceeding.

54. Since the decision of the Judicial Committee of the Privy Council in *Montreal Street Railway Co.*, Canadian courts have regularly applied the principles articulated in that case when

interpreting statutes that require the performance of a private duty or obligation. Professor Sullivan, in *Sullivan on the Construction of Statutes*, states (at page 77) that:

> "[t]he mandatory-directory distinction is not limited to obligations imposed on public officials: it has been applied as well to requirements imposed on the public as conditions precedent to receiving a benefit or enforcing a right".

A review of some of the decisions from Canadian courts demonstrates quite clearly that this statement accurately describes the current state of the law.

55. In *Wapass v. Thunderchild Band Council*, (1997) CanLII 5773 (F.C.), one question before the Federal Court was whether the failure by a Band Councillor to establish a residence on the reserve within 30 days after being elected, as required by statute, warranted the conclusion that her office ought to be declared vacant. Her inability to secure residency was the result of a short supply of housing on the reserve. The relevant legislation did not specify what result should follow from a failure to meet the residency requirement. After citing a portion of the excerpt from the Supreme Court of Canada decision in *Blueberry River Indian Band* set out above at paragraph 51, Madame Justice Reed concluded that the provision should be read as being directory, because it was not a sensible reading of the legislation to conclude that Band members, when they adopted the residency requirement, intended that individuals who had been elected should lose their office if they were unable to obtain housing on the reserve through no fault of their own. In *Wapass*, the principles established in *Montreal Street Railway* and subsequently confirmed by the Supreme Court of Canada were applied by the Federal Court to a situation involving the failure by an individual to fulfill a private statutory obligation.

56. The Saskatchewan Court of Appeal has also applied the principles identified above in the context of a private statutory duty or obligation. In *Hawrish v. Law Society of Saskatchewan*, (1998) CanLII 12350 (SK C.A.), the question before the court was whether the Discipline Committee of the Law Society of Saskatchewan was without jurisdiction to act upon a decision of a hearing committee because the hearing committee had failed to provide its decision to the Discipline Committee within 45 days of the hearing, as required by the relevant statutory provision. The hearing committee had not delivered its decision to the Discipline Committee because Mr. Hawrish had appealed that decision itself to the Saskatchewan Court of Appeal. Mr. Justice Cameron, for the court, cited the relevant principles from the Supreme Court decisions in *Montreal Street Railway Co.* and *British Columbia (Attorney General)*, both cited above, and stated that "[a]s usual, the whole of the legislative context must be looked to, along with the consequences of construing a provision as directory or mandatory, in determining whether the legislature had one or the other in mind".

57. Cameron J.A. concluded that the statutory provision was properly regarded as directory rather than mandatory. He noted that the fact that the statute contained no provision for enlargement of the 45 day time period did not mean that a failure to abide by the time requirement was intended to be fatal, in the sense of voiding the decision, precluding the hearing committee from giving it to the Discipline Committee, or leaving the Discipline Committee powerless to act upon it. In fact, Cameron J.A. concluded (at paragraph 7) that "... the nature, purpose and setting of the provision suggest otherwise, as does the prospect of treating the provision as mandatory". In that regard, Cameron J.A. stated (at paragraph 9) that he and his colleagues " ... do not think the legislature intended to ascribe fatal effect to every failure of the hearing committee to report one of its decisions to the Discipline Committee within 45 days of the hearing. Were it otherwise, even a mere slip in

failing to so report a decision upholding a complaint would sound the death of the proceedings, even though the complaint had already been determined on its merits, with only sentencing remaining". He concluded in that same paragraph that to regard the provision as mandatory "would not so much achieve as defeat the object of these provisions and would be inimical to the interests of all but the lawyer against whom the complaint was made".

58. There have been numerous other cases decided by Canadian courts in which the principles established by *Montreal Street Railway Co.*, *Blueberry River Indian Band* and *British Columbia (Attorney General)* were applied to the performance of a private statutory duty or obligation. In *Hi Hotel Limited Partnership v. Holiday Hospitality Franchising Inc.*, (2007) ABQB 686 (appeal dismissed, (2008) ABCA 276 (CanLII)), the principles outlined in *Blueberry River Indian Band* were applied by a judge of the Alberta Court of Queen's Bench (and approved by a panel of the Alberta Court of Appeal) to circumstances in which a franchisor failed to provide the franchisee with a signed and dated certificate, as required by the relevant franchise legislation. A recent decision of the Manitoba Court of Appeal has also considered the "mandatory-directory" distinction in the context of a private statutory obligation or duty. In *Ference v. Wohlers*, (2007) MBCA 68 (CanLII), the question before the court was whether a failure on the part of a stable keeper to conspicuously post the provisions of the relevant legislation (as required by that legislation) was fatal to his claim for a lien over his client's herd of bison. After setting out the passage of Sullivan & Driedger identified above in paragraph 48, and the observations of the Supreme Court of Canada in *British Columbia (Attorney General)*, identified above in paragraph 51, Joyal J.A. states as follows, at paragraphs 23 to 25:

> 23. Part of the "usual process" of statutory interpretation involves examining the object and purpose of the Act. In the context of examining the meaning of "shall", the discerning of the object and purpose of an Act (the legislative intention) is meant to assist in answering the following question: Does the failure to comply with a requirement of a particular provision entail a nullity? See *Cleary v. Canada (Correctional Service)*, (1990), 44 Admin. L.R. 142 (F.C.A.). See also, *Hawrish v. Law Society of Saskatchewan*, (1998), 161 D.L.R. (4th) 760 (Sask. C.A.). Where "shall" is interpreted as mandatory, failure to comply will entail a nullity. See *Doucet v. British Columbia (Adult Forensic Psychiatric Services)*, (2000) BCCA 195, 185 D.L.R. (4th) 313. In *Doucet*, "shall" was interpreted as mandatory after Lambert J.A. questioned whether Parliament would intend to enact such a totally ineffective provision.
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> 24. The identification of the purpose of a particular provision is also important because where failure to comply with a requirement of a provision defeats the purpose of that provision, the imperative command "shall" will be interpreted as mandatory.
>
> 25. In *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)* … [t]he Supreme Court of Canada concluded that "shall" should be read as directory and not mandatory. That determination turned on the fact that the process of formally assenting to surrender [of land] "would work serious inconvenience" (at paragraph 43) and that the failure to comply with that requirement would not defeat the purposes of the provisions. …

Ultimately, the Manitoba Court of Appeal determined that the obligation of the stable keeper to post the provisions of the legislation was mandatory. His failure to do so was fatal to his claim for a lien over the herd of bison.

59. Finally, in the Supreme Court of Canada decision of *M & D Farm Ltd.*, cited above at paragraph 52, the issue in dispute was whether a court order secured by a mortgagor granting it leave to commence foreclosure proceedings was invalid. The Supreme Court concluded that the court order was, in fact, invalid as a result of the doctrine of federal paramountcy. The mortgagor argued, however, that even if the court order were invalid, it could be saved because the invalidity was in the nature of an irregularity rather than a nullity. After stating the passage set out above at paragraph 52, the Supreme Court concluded that the relevant farm protection legislation clearly identified that any court action commenced without obtaining leave of the court is a nullity – thus making it clear that the statutory provision requiring leave of the court was mandatory and not directory.

60. It is evident from these cases (and numerous other court decisions like them) that the principles applied by the Judicial Committee of the Privy Council in *Montreal Street Railway Co.*, and by the Supreme Court of Canada in both *Blueberry River Indian Band* and *British Columbia (Attorney General)*, all cited above, are not limited in their application to the exercise of a duty imposed by statute upon public officials. The law has developed since the *Montreal Street Railway Co.* decision in 1917, and there is no obvious reason why the principles ought not to apply more broadly to circumstances involving the performance of a private obligation or duty required by statute. Many Canadian Courts of Appeal and the Supreme Court of Canada do not consider the distinction between statutory duties imposed upon public officials and those imposed upon private individuals to be a meaningful one. As a result, the relevant principles are applicable to the exercise of a private duty or obligation imposed by statute, such as arose in the instant proceeding before the Board.

61. Turning to the provision of the Act in question, subsection 128.1(3) of the Act states that, within two days after receiving notice under subsection 128.1(2) of the Act (excluding Saturdays, Sundays and holidays), the employer "shall provide the Board with" the names of the employees in the bargaining unit proposed in the application, as of the application filing date. In an application brought pursuant to section 128.1 of the Act, the notice under subsection 128.1(2) is contained on the face of the application for certification form. As noted by the Board in *Air Kool*, no provision in the Act expressly provides the Board with the authority to extend the two day time limit contained in subsection 128.1(3) of the Act.

62. Professor Sullivan notes in the excerpt from *Sullivan on the Construction of Statutes* set out above in paragraph 48 that in some legislation the consequences of failing to do what one is obliged to do are clearly set out, but that in other contexts the legislation may be silent. Where the consequences of failing to comply with a statutory obligation are clearly set out, courts are more likely to conclude that the obligation is mandatory rather than directory (see, for example, *M & D Farms Ltd.*, cited above, at paragraph 59). As noted above, in *Air Kool* the Board concluded that there is a "statutory consequence" resulting from an employer's failure to file timely information pursuant to subsection 128.1(3) of the Act, namely the calculation required by section 128.1(4), and subsequent certification. Because any late-filed information in the hands of the Board is not information "provided under subsection (3)" of the Act, and because there is nothing in the Act that expressly provides the Board with the power to deem this information to be timely, the Board

concluded that it cannot "fix" or "disregard" the failure to comply, and that the obligation set out in subsection 128.1(3) of the Act must be mandatory.

63. In my view, the Act is silent regarding the consequences that accrue to those who fail to file the required information within the two day time limit. Subsection 128.1(4) of the Act *does* require the Board to effect a numerical calculation on the basis of the information provided pursuant to subsection 128.1(3) of the Act. But subsection 128.1(4) of the Act does *not* stipulate *when* the Board is required to make that calculation – only that the calculation should take into account any information provided to the Board in or with the application and under subsection 128.1(3). If the information required to be filed with the Board pursuant to subsection 128.1(3) of the Act is received by the Board beyond the statutory two day limit, the question still arises as to whether the Board has the discretion to use that information when it ultimately comes time to make the calculation; that is, whether the Board has the discretion to treat that late-filed information as if it were information "provided under subsection (3)". Concluding that the information in the possession of the Board at that time cannot be taken into account because it is not "provided under subsection (3)" triggers the calculation which establishes the "statutory consequence" permitting the Board to conclude that the obligation in subsection (3) is mandatory. This reasoning tautologically assumes a negative answer to the very question that the Board is asking itself; that is, whether the Board can in fact consider the late-filed information as being "provided under subsection (3)" on the basis that the word "shall" is directory.

64. The consequences of an employer failing to do what subsection 128.1(3) of the Act states it shall do are not clear from the provisions of the Act. The Act does not "clearly set out" (to use the language of Professor Sullivan) that the Board cannot consider the required information if that information is filed beyond the two day time limit contained in subsection 128.1(3) of the Act. It would have been simple for the Legislature to have stated in the Act that the Board has no authority to consider any information filed after the expiry of the two day time period. It did not do so. Quite simply, the Act is silent regarding the consequences of filing information required by subsection 128.1(3) of the Act beyond the two day limit. Silence does not denote that the statutory provision is "mandatory" and that no relief can be afforded to those who fail to abide by it. Professor Sullivan states that in these situations "it is left to the courts to determine whether non-compliance can be cured". If it is determined that the provision is mandatory, non-compliance with the provision cannot be cured. If it is determined that the provision is directory, non-compliance with the provision can be cured.

65. On what basis is the "mandatory" or "directory" determination made? The case law that describes the basis for this determination is set out above, in paragraphs 50 to 52. Canada's highest court has clearly stated on a number of occasions that "the most important considerations" in determining whether a statutory provision is mandatory or directory are *the purpose of the statute* and *the effect of ruling one way or the other*. Professor Sullivan notes in her text that in addition to these two most important considerations, textual evidence of legislative intent is also relied upon by the courts. This too is part of the "usual process" of statutory interpretation. It is incumbent upon the Board to consider the nature of the obligation contained in subsection 128.1(3) of the Act in the context of these important considerations.

66. With respect to the purpose of the statute, in *Air Kool* the Board noted that expedition is an important objective of the Act, and that the approach taken by the Board in that decision is consistent with that purpose. I agree with that observation. Expedition is a purpose of the Act, and

ought to be a highly significant consideration, particularly with respect to certification applications. However, it is important for the Board to consider all of the purposes and objectives of the Act, and not just one purpose, that of expedition.

67. Section 2 of the Act identifies other purposes of the Act that have bearing upon the question of whether the word "shall" contained in subsection 128.1(3) of the Act is mandatory or directory. Section 2 of the Act provides as follows:

> **2.** The following are the purposes of the Act:
>
> 1. To facilitate collective bargaining between employers and trade unions that are the freely-designated representatives of the employees.
> 2. To recognize the importance of workplace parties adapting to change.
> 3. To promote flexibility, productivity and employee involvement in the workplace.
> 4. To encourage communication between employers and employees in the workplace.
> 5. To recognize the importance of economic growth as the foundation for mutually beneficial relations amongst employers, employees and trade unions.
> 6. To encourage co-operative participation of employers and trade unions in resolving workplace issues.
> 7. To promote the expeditious resolution of workplace disputes.

68. If the approach articulated in *Air Kool* were uniformly applied, there could be many results inconsistent with the first purpose identified by section 2 of the Act – facilitating collective bargaining between employers and trade unions "that are the freely-designated representatives of the employees". The approach articulated by the Board in *Air Kool* allows for a trade union to be certified as the exclusive bargaining agent of a unit of employees without that agent necessarily having enjoyed the support of more than 55% of the employees in that same unit. In the absence of a situation where delay or other behaviour on the part of the employer has created circumstances making it difficult for the union to determine who was at work on the application filing date, or what they were actually doing, such a result is undesirable. Applying the approach in *Air Kool* in circumstances where the trade union has much less than 55% support in the bargaining unit would mean that the Board will certify an applicant as bargaining agent notwithstanding that the applicant was not the "freely-designated representative" of the statutory majority of the employees in the bargaining unit. Although certifying in these circumstances is undoubtedly expeditious, the consequence is to permit certification of a bargaining agent in a situation where the support of the statutory majority of employees in the bargaining unit was not secured by the applicant. To allow such a result undermines one of the other express purposes of the Act.

69. The result reached by the Board in *Air Kool* is also unlikely to foster or facilitate the sixth purpose identified in section 2 of the Act – encouraging co-operative participation of employers and trade unions in resolving workplace issues. In the circumstances identified immediately above, it is

unlikely that an employer that receives a Board decision certifying a trade union which does not appear to have secured the required statutory level of support by reference to the actual workforce on the application filing date is going to participate co-operatively with the union that is certified by the Board. From the employer's perspective, the union in these circumstances lacks legitimacy as the bargaining agent for its employees. It is also likely that at least some of the employees in the bargaining unit will be of the view that the union certified by the Board is not their legitimate bargaining representative. A poisoned labour relations relationship is the obvious result. In contrast, if both the employer and the employees in the bargaining unit were satisfied that the majority of the employees in an appropriate bargaining unit voluntarily desired a trade union to represent them, then the likelihood of co-operation in the future is much higher. The unfairness to an employer of not being able to put its position before the Board because it missed the two day statutory deadline will militate against co-operation with the union with regard to resolving workplace issues.

70. Considered in the context of all of the relevant purposes of the Act identified in section 2, the result reached by the Board in *Air Kool* is consistent with only one of those purposes and undermines at least two others. Having regard to all of the purposes of the Act, and in particular the express belief of the Legislature that "freely-designated" representation underpins one of those purposes, it is hard to accept that the Legislature desired the Board not to have the discretion to consider the information referred to in subsection 128.1(3) of the Act that is contained in a response that is filed late with the Board.

71. This leads to a consideration of the consequences of the interpretation taken by the Board in *Air Kool*. As noted above, the Supreme Court of Canada has recently identified as one of the two most important considerations in determining whether a statutory provision is mandatory or directory the effect of ruling one way or the other. What are the consequences here of concluding that the two day time limit reflected by subsection 128.1(3) of the Act is mandatory in nature?

72. The consequences will be the same in every case. The Board will not review any response filed by a responding party for the purposes of considering the information identified in subsection 128.1(3) of the Act – namely the names of the employees in the bargaining unit proposed in the application on the application filing date, and the names of any persons that may be included in a bargaining unit proposed by the responding party. Most importantly, for the purposes of making the assessment required by subsection 128.1(4) of the Act, the Board will determine the bargaining unit description and the percentage of employees in that unit by reference only to the information provided by the applicant, and without reference to any information filed by the responding party.

73. On many occasions these consequences can have, as described by the appeal court decisions referred to above, "inconvenient" effects or will result in "serious general inconvenience" that will create unfairness. These consequences have been reflected by some of the cases that have arisen before the Board since *Air Kool*. Consider, for example, the factual circumstances before the Board in *Maystar* itself. In *Maystar*, the applicant union had received delivery of the response, but through the responding party's solicitor's inadvertence the response had not been filed with the Board within the two day time limit. There was no prejudice at all to the applicant, because it was aware of the position that the responding party took with respect to the application within the statutory two day time frame. The Board nonetheless was not prepared to consider the information contained in the response when it was filed with the Board shortly thereafter. The Board certified a trade union for a bargaining unit of employees, notwithstanding that the trade union did not have to answer the

employer's assertion that the trade union did not represent a majority of its employees in the bargaining unit.

74. Consider a slightly different scenario. Should the delivery person filing the responding party's response with the Board be delayed for reasons entirely beyond his or her control - for example by reason of sickness, injury or accident - and should the response not be filed with the Board in a timely fashion as a result of that delay, the approach adopted by the Board in *Air Kool* would preclude the Board from considering the critical portion of the response ultimately filed by the responding party, even though the applicant union had the response delivered to it before the expiry of the two day time limit and was aware of the position of the responding party in a timely fashion. Similarly, if a facsimile transmission of the response does not successfully reach the Board for some reason beyond the control of the responding party, such that the response does not reach the Board in a timely fashion, application of the approach reflected by *Air Kool* precludes the Board from considering the substance of the response for the purposes of its obligations under subsections 128.1(3) and 128.1(4) of the Act. This result occurs even if the failure to receive the facsimile transmission of the response is due to a *failure on the part of the Board itself.* No discretion means no discretion.

75. The approach adopted by the Board in *Air Kool* has resulted in decisions of the Board that have created a distinction between those portions of a late-filed response that the Board may refer to (having regard to Rule 40.7 of the Board's Rules of Procedure, which permits the Board to relieve against the two day time limit for delivering a response, reflected by Rule 7.3), and those portions of a late-filed response that the Board may not consider because the wording of subsection 128.1(3) of the Act is treated as being mandatory in nature.

76. Depending upon the circumstances, the results of applying this distinction can be both surprising and arbitrary. If the responding party asserts that it has no employees in a late-filed response, the Board will consider the entire response, because the Board has not treated that issue as one that triggers the statutory time limit reflected by subsection 128.1(3) of the Act (see *Easton's Group of Hotels Inc*., [2006] OLRB Rep. July/August 508 (Aug. 9, 2006)). If the responding party raises any other substantive issue in the response that requires adjudication (for example, the proper identity of the responding party, whether one or more other entities may be a related employer for the purposes of the Act, or whether a third party is the "true employer" for the purposes of the Act), the Board will consider the response - but only to the extent necessary to adjudicate those issues.

77. The incongruous results that can occur as a result of this distinction are reflected by the recent decision of the Board in *D.D.R. Landscape Contractors Ltd*., (2008) CanLII 40839 (ON L.R.B.) (Aug. 7, 2008), as amended by (2008) CanLII 44413 (ON L.R.B.) (Aug. 15, 2008). In that proceeding, the Labourers' union applied for its usual province-wide ICI sector bargaining unit, which the Board found to be appropriate for bargaining. The Board refused to consider the substance of a late-filed response to the extent that it spoke to the items identified by subsection 128.1(3) of the Act. The company asserted in its response that it had no employees for the purposes of the Act. Accordingly, the Board was prepared to consider the substance of the response for the purpose of determining whether the individuals identified by the applicant union were "employees" of the company. The Board stated (at paragraph 23) that it would exercise its discretion to extend the time for filing a response:

> "... but only for the purpose of determining whether the persons ... on whose behalf the applicant has filed membership evidence were employees of the responding party. If they are found to be employees of the responding party, then they are employees in the bargaining unit".

The potentially peculiar result is the consequence of the Board's determination that should it be found that the identified individuals are "employees" of the company for the purposes of the Act, they are to be considered "employees in the bargaining unit". Should it be determined by the Board that any two of the individuals signed by the applicant and asserted to be construction labourers by that union are employees of the company – even if the evidence were to suggest that they were performing the work of an electrician on the application filing date – those persons are deemed to be "construction labourers" for the purposes of determining whether the Labourers' union ought to be entitled to certification as the bargaining representative of the company's construction labourers. In fact, this same result would occur even if the evidence were to suggest that *neither individual was actually at work* on the application filing date. Except in situations where the employer has created circumstances making it difficult for the union to determine who was actually at work on the application filing date, or what those individuals were actually doing (such as an unreasonable delay), this result is inconsistent with long-standing Board jurisprudence and the purposes of the Act set out above.

78. In my view, the Legislature could not have intended that the Board be precluded in every case from considering information provided by the employer that is referred to in subsection 128.1(3) of the Act should that information be delivered to the applicant and/or filed with the Board beyond the two day statutory time limit. As the examples set out above make clear, such a result can make little practical sense in certain circumstances.

79. As noted above, it is stated in *Sullivan on the Construction of Statutes* that textual evidence of legislative intent is also relied upon by the courts when considering whether a statutory provision is mandatory or directory. In *Air Kool*, the Board spent some time analysing various provisions of the Act in order to support the conclusion that subsection 128.1(3) of the Act is mandatory in nature.

80. There is, however, also textual evidence of legislative intent in the Act to support the proposition that the two day time frame set out in subsection 128.1(3) is directory in nature. In *Maystar*, the Divisional Court noted that there is nothing stated in subsection 128.1(3) or 128.1(4) of the Act that directs the Board to not consider the late-filed information. The Divisional Court also noted that if the Legislature had intended the Board to refuse to consider late-filed information in every case, it could have expressly stated so in the Act. In the recent decision of *City of Hamilton v. United Brotherhood of Carpenters & Joiners of America, Local 18* (unreported decision dated November 5, 2008), the Divisional Court made the following observation regarding a proposed interpretation of section 128.1 of the Act that would have precluded the Board from issuing a certificate to a trade union in the absence of *any* response from an employer:

> [17] ... Throughout the Act, the Legislature has made it abundantly clear what the Board can or cannot do, what it shall or shall not do, and what it may or may not do. Nowhere in the Act has the Legislature said that the Board has no discretion to certify a union without first hearing from the employer. Had the Legislature intended that the Board not act exclusively upon union information, it surely would have made that clear.

Similarly, nowhere in the Act has the Legislature clearly said that the Board has no discretion to consider information provided by the employer that is referred to in subsection 128.1(3) of the Act should that information be delivered to the applicant and/or filed with the Board beyond the two day statutory time limit.

81. The ability of the Legislature to draft language of this nature, should it desire to do so, is demonstrated by subsection 8(3) of the Act, which relates to voted-based applications for certification. It provides that the Board's determination that 40 per cent or more of the individuals in the bargaining unit proposed in the application appear to be members of the union on the application filing date shall be made "based *only upon* the information provided in the application for certification and the accompanying information provided under subsection 7(13)". An almost identical provision of the Act exists with respect to termination applications (see subsection 63(6) of the Act).

82. Similarly, the Board is limited in the exercise of its power to issue interim orders under section 98 of the Act. Subsection 98(2) of the Act states that the Board's powers as defined by subsections 98(1)(b) and 98(1)(c) of the Act may be exercised " … *only if* the Board determines that all of the following [four] conditions are met …".

83. Perhaps the most significant provision of the Act in this respect (because in some way it parallels the decision made by the Board pursuant to subsections 128.1(3) and 128.1(4) of the Act), is section 133. Section 133 of the Act establishes the Board as a board of arbitration with respect to construction industry grievances. Section 133 of the Act provides the Board with the authority to render default awards should the responding party not file any material in response to the union's application. Subsection 133(7) of the Act provides that the Board is not required to hold a hearing to determine the proceeding should the responding party not file such material. Of significance, subsection 133(8) of the Act provides that in these circumstances "… the Board may determine the matter *with reference only to* the material filed by the party referring the grievance".

84. It is notable, therefore, that there is no express "default" provision contained in section 128.1 of the Act such as that reflected by subsection 133(8) of the Act. If the Legislature had desired that the Board always determine the bargaining unit and the percentage of employees in the bargaining unit who are members of the trade union by reference only to the materials filed by the applicant when a late-filed response is in hand, it could have expressly said so. It did not. When the responding party chooses to file no response (an occurrence that is not unusual), the Board will only have in its possession the information and materials filed by the applicant, and quite properly will effect the calculation required by subsection 128.1(4) of the Act based upon that information and those materials (see the *City of Hamilton* decision, cited above). But where a late-filed response is filed by an employer with the Board, the Board is not expressly precluded by the Act from making reference to the information contained in that response for the purposes of making the calculation required by subsection 128.1(4) of the Act.

85. There is, accordingly, considerable textual evidence to suggest that the Legislature intended subsection 128.1(3) of the Act to be directory in nature, and not mandatory.

86. The Board is a quasi-judicial tribunal responsible for interpreting and applying the Act in the Province of Ontario, including those provisions of the Act relating to applications for certification. The Board is required to apply principles of natural justice and procedural fairness when determining

applications for certification such as the instant case. An employer that is named as a responding party to an application for certification normally has the right to be heard on all issues that arise in that application. If the Legislature had intended for the Board to deny an employer the right to be heard on one of the most important issues in every application for certification - the level of employee support - in every case when the information required to be filed pursuant to subsection 128.1(3) of the Act is delivered to the Board after the expiry of the two day timeframe reflected by that subsection, it would have done so clearly. In my view, it has not done so.

87. A few final observations are warranted. In my view, the result reached in this decision is supported by reference to the French version of the Act. Section 65 of the *Legislation Act, 2006*, S.O. 2006, c. 21 provides that the English and French versions of the Act are "equally authoritative". As a result, reference may usefully be made to the French version of the Act to determine whether the Legislature intended the word "shall" in subsection 128.1(3) of the English version of the Act to be mandatory in nature. In the French version of the Act, subsection 128.1(3) of the Act reads as follows:

> (3) Dans les deux jours, exception faite des samedis, dimanches et jours fériés, qui suivent la réception de l'avis prévu au paragraphe (2), l'employeur fournit à la Commission:
>
> a) d'une part, les noms des employés compris dans l'unité de négociation proposée dans la requête le jour de son dépôt;
>
> b) d'autre part, s'il lui donne une description écrite de l'unité de négociation qu'il propose, conformément au paragraphe 7 (14), les noms des employés compris dans cette unité de négociation le jour du dépôt de la requête.

88. It is noteworthy that the Legislature used the phrase "l'employeur fournit à la Commission" in the French version of subsection 128.1(3) of the Act. The verb utilized in the French version of the provision is "fournir", meaning "to furnish" or "to provide". Notably, the verb tense used in the French version of subsection 128.1(3) of the Act is the present tense. Translated into the English language, the provision states that within the two day time limit identified by section 128.1 of the Act, the employer "provides" to the Board the materials set out in subsection 128.1(3). The language does *not* state that the employer "must provide" ("doit fournir") this information, nor does it state that the employer "shall provide" ("fournira") this information.

89. Neither the English nor the French version of the Act has paramountcy (see the discussion in *Sullivan on the Construction of Statutes*, cited above, at page 96 and following). As a result, both the French and the English version of the Act must be considered in order to determine the intention of the Legislature. Where the two versions of a bilingual enactment appear to say different things, an adjudicator is obliged, if at all possible, to find an acceptable meaning common to both versions of the legislation. This obligation is reflected by what Professor Sullivan identifies in her text as the "shared or common meaning" rule of interpretation. This rule reflects the proposition that where there is a discrepancy between the two versions of bilingual legislation, a meaning that is common to both or shared by both ought to be adopted unless that common or shared meaning is for some reason unacceptable. The best way to reconcile conflicting versions of legislation is to identify and adopt a meaning that may be plausibly attributed to both (see *Sullivan on the Construction of Statutes*, cited above, at page 100).

90. In the instant case, reconciling the differences reflected by the two versions of subsection 128.1(3) can be effected by adopting an interpretation of the English version of subsection 128.1(3) of the Act that is directory rather than mandatory. Because the French text of subsection 128.1(3) of the Act does not utilize a verb tense that is consistent with a mandatory obligation, adopting an interpretation of the English version of subsection 128.1(3) of the Act that determines the word "shall" to be mandatory is inconsistent with the principle of seeking a shared or common meaning for both the French and the English texts. If the Board were to conclude that the word "shall" in subsection 128.1(3) of the Act is directory, and not mandatory, the inconsistency is eliminated.

91. Finally, subsection 64(1) of the *Legislation Act, 2006*, cited above, provides that the Act is to be given "such fair, large and liberal interpretation as best ensures the attainment of its objects". As established above, treating the obligation contained in subsection 128.1(3) of the Act as directory rather than mandatory best ensures the attainment of the objects of the Act specifically identified by the Legislature in section 2.

92. For all of the reasons set out above, I am of the view that the reasoning of the Board in *Air Kool* should no longer be followed. Considered in the context of the purposes of the Act, subsection 128.1(3) properly requires an interpretation of the word "shall" that is directory and not mandatory in nature. An interpretation of the word "shall" that concludes that the word is directory in nature is consistent with and best ensures the attainment of the purposes of the Act, eliminates the unintended consequences that result from concluding that the word is mandatory, is consistent with establishing a common meaning for both the English and French texts of the Act, and is consistent with the principles of natural justice.

Exercising the Board's Discretion in this Proceeding

93. The Board considers it important to state something that should be obvious. In every construction application for certification filed with the Board pursuant to section 128.1 of the Act, the Board expects the responding party to deliver its response to the applicant and to file that response with the Board within the two day time limit contained in subsection 128.1(3) of the Act. The Legislature determined that the employer community ought to be able to provide the information identified in subsection 128.1(3) of the Act within that two day period, and the Board expects that that information will be delivered to the applicant, and filed with the Board as part of the employer's full response, within two days of receipt of the application.

94. The Board has the authority to consider late-filed information should it determine that it is appropriate to do so. The Board will exercise its discretion to consider late-filed information having regard to all of the circumstances before it, but those circumstances must establish a compelling case for relief. As a result of the prejudice that typically accrues to trade unions in the construction industry when a late response is delivered and filed with the Board, the employer community must appreciate that the Board will be reluctant to exercise its discretion to consider late-filed information in the absence of those compelling circumstances.

95. Turning to the circumstances before the Board in this proceeding, and considering the factors identified by the Board in *Carman Construction Inc.*, cited above, it was reasonable for Mr. Bogart to have assumed that the envelope delivered to him late in the day on Monday, September 29, 2008 was a copy of the first application for certification. There does not appear to be any dispute that the two applications for certification appeared "remarkably similar". It is of considerable significance

here that the applicant conceded that in the normal course in circumstances such as these it would be appropriate for the Board to consider the late-filed information. The responding party appears to have legitimately misunderstood that there were two applications for certification in play, and appears to have legitimately believed that materials sent to it respecting the second application for certification were, in fact, related to the first application for certification. In these circumstances, the failure by Mr. Bogart to notice that a second, distinct application for certification was contained in the envelope provided to him on Monday, September 29, 2008 was a reasonable error.

96. The applicant asserts that one factor that ought to persuade the Board to not exercise its discretion to consider the late-filed information is that Mr. Bogart is misleading the Board because he knew at all relevant times that the first application for certification had been delivered to the responding party on September 25, 2008. The Board is clearly not in a position at this time to determine whether Mr. Bogart was or was not aware of the first application when contacted on Monday, September 29, 2008 by the applicant's organizer. Although delivery to the responding party was clearly effected by the applicant leaving the first application for certification in the responding party's mailbox, it is impossible for the applicant to establish that the certification package remained in that mailbox and was physically picked up by a representative of the responding party. The responding party asserted that no application was found in the mailbox and has acted consistently with that assertion throughout. Mr. Bogart's actions after the second application for certification was delivered to him late in the day on Monday, September 29, 2008 were consistent with the responding party's assertion that he was not aware that the envelope given to him late that day was a fresh application for certification.

97. Similar to the situation facing the union in *Carman Construction Inc.*, cited above, the applicant could have alerted the responding party to the fact that the documentation contained in the envelope provided to the responding party on Monday, September 29, 2008 was a second, distinct application for certification. If it had done so, the responding party would have clearly understood that two separate applications had been filed with the Board in close proximity, and its error would not have been reasonable. In light of the Board's decision in *Carman Construction Inc.*, an applicant that desires to avoid confusion on the part of a responding party should highlight in the second package of materials that that package relates to a second, separate application for certification. It is not a difficult thing to do, and it eliminates the possibility of confusion on the part of the responding party.

98. There does not appear to be any dispute that the responding party acted quickly upon learning of the true situation. The responding party appears to have learned from the Board during the day on Wednesday, October 1, 2008 that a second application for certification had been filed by the applicant, and a response was delivered to the applicant and filed with the Board by the end of the day on Thursday, October 2, 2008. As indicated by the Board in *Carman Construction*, the responding party asserted the facts upon which it relied for the late filing of the response in the response document itself. In addition, there is no dispute that the responding party filed a timely response through counsel to the first application for certification on Monday, September 29, 2008.

99. In the circumstances, I am satisfied that the responding party almost certainly would have filed a timely response to this proceeding but for the innocent error of not identifying the existence of the second application for certification. As noted above, the responding party appears to have been oblivious to the second, separate proceeding. The applicant, though under no legal obligation to do so, could have taken steps to bring the existence of the second application for certification to the

attention of the responding party, and to that extent contributed to the innocent error committed by the responding party. These factors all militated in favour of exercising the Board's discretion to consider the late-filed information contained in the response.

100. I have considered the prejudice caused to the applicant as a result of the one day delay by the responding party in delivering a response to the application. There was almost certainly some prejudice that accrued to the applicant in the circumstances, in that it did not learn until October 2, 2008 that in the second certification proceeding the employer would assert that there were seven sites and 32 employees in the appropriate bargaining unit on the application filing date, instead of the five sites and 22 employees whom the applicant asserts are properly in the unit. However, the applicant has not asserted the existence of any prejudice in its submissions to the Board. In that regard, the Board notes that the applicant identified in its application that the responding party was performing bargaining unit work at "various jobsites" on the application filing date, "including" the five listed sites, which suggests that the applicant may have suspected that the responding party was performing such work at job sites other than those specifically identified in the application.

101. Having regard to all of these factors, and considering them together as a whole, I was of the view that a compelling case for the exercise of the Board's discretion had been made out by the responding party. As a result, I determined that the Board should exercise its discretion and consider the information contained in the response that was filed late with the Board, and directed same by way of decision dated October 10, 2008.

COURT PROCEEDINGS

3414-06-R; 0389-07-R; 3395-06-R; 3436-06-R; 3441-06-R; 3502-06-R; 3503-06-R; 3611-06-R; 3685-06-R; 3991-06-R (Court File No. 202/08) Universal Workers Union, Labourers' International Union of North America, Local 183 v. **Canadian Construction Workers' Union et al.** and OLRB

Certification – Construction Industry – Judicial Review – Status – Trade Union – Local 183 challenged the CCWU's status as a construction industry trade union in a number of the CCWU's applications for certification – Although the Board found that the CCWU had status as a trade union pursuant to s. 1(1), it held that, absent a concluded collective agreement with an employer in the construction industry or other indicia of activity consistent with trade union practice that pertained to the construction industry, the applicant lacked status as a trade union in the construction industry pursuant to 126(1) – CCWU's lack of this status was fatal to the present applications for certification in the construction industry – The Board also found that section 15 did not apply to the applications for certification, as the consequences of any improper employer activity had no impact on the applications before the Board – On reconsideration, although successful, Local 183 asked the Board to reconsider its ruling on s. 15 – The Board noted that the applications were, for other reasons, dismissed and that, in any event, if section 15 were found to have applied, the result in these applications would have been the same – On judicial review the Court found the matter moot (no live issue between the parties) and further found no public interest in reviewing the Board's obiter comments on s. 15 – Judicial Review dismissed

Board decision reported at [2008] OLRB Rep. January/February 21.

Superior Court of Justice (Divisional Court), Ferrier, Lederman and Swinton JJ., December 22, 2008

LEDERMAN J.: (Orally)

[1] The Board found that the CCWU was not a construction industry trade union within the meaning of s.126(1) of the *Labour Relations Act.* As the Board found that it did not have that status, for that reason alone, the ten applications for certification were dismissed.

[2] The Board also stated that whether s.15 of the *Act* applied or not, the result would have been the same.

[3] The Board's decision was upheld on reconsideration.

[4] Local 183 was therefore successful in its position before the Board that the CCWU's applications for certification should be dismissed.

[5] There is no live controversy before this Court and therefore the application for judicial review is moot. The only issue is whether on a consideration of the factors set out in *Borowski v. Canada* [1989] 1 S.C.R. 342, we should entertain this application for judicial review, notwithstanding its mootness.

[6] There is no public interest in reviewing the obiter comments of the Board concerning s.15 which were not the basis of its decision. The interpretation and application of s.15 should be considered by this Court only when it tforms the ratio of the Board's decision.

[7] For these reasons the application is dismissed.

FERRIER J.

[8] I endorse the application record: "This application is dismissed for mootness for oral reasons delivered this day. Costs to the respondent CCWU fixed at $7,500.00".

1785-05-R (Court File No. 209/06) City of Hamilton v. United Brotherhood of Carpenters and Joiners of America, Local 18 and OLRB

Certification – Construction Industry – Judicial Review – Reconsideration – The City sought judicial review of a Board decision certifying the carpenters, asserting that it never received proper notice of the application for certification because the union's documents were sent to a facsimile machine that was not monitored on a regular basis – The court held that the Board's decision was reasonable – The court specifically rejected the City's argument that there was an obligation on the Board to consider every late-filed response – The Court noted in any event that the Board had offered the City an opportunity to address the notice issue, but the City had failed to respond to the offer – The Board's treatment of two reconsideration requests was also found to be reasonable – Application dismissed

Board decision not reported.

Superior Court of Justice (Divisional Court), Lederman, Bellamy and Karakatsanis, JJ, November 5, 2008

ENDORSEMENT

Nature of Proceeding

[1] The Applicant City of Hamilton (City) seeks judicial review to quash the September 12, 2005 decision by the Ontario Labour Relations Board (OLRB or Board) to certify the Respondent United Brotherhood of Carpenters and Joiners of America, Local 18 (Union) as a bargaining agent for a unit of the City's employees. The Applicant also seeks judicial review of two denials of requests for reconsideration dated November 9, 2005, and February 11, 2008, respectively. The City asks for an order quashing and setting aside all three decisions of the OLRB.

Application for Certification

[2] On Thursday September 1, 2005, the Union filed an application for certification with the Board to represent carpenters and carpenters' apprentices employed by the City in the construction industry. The Union stated that to the best of its knowledge it was submitting membership evidence on behalf of two of three persons in the bargaining unit.

The Alleged Improper Notice: Was There a Denial of Natural Justice?

[3] The Union was required to deliver a copy of its certification application to the City, and therefore faxed a copy addressed to the appropriate facility's supervisor in the City. The Union's organizer stated that he obtained the fax number from an assistant to the supervisor, as a result of a general inquiry. While the supervisor did receive faxes at this location and did customarily check faxes delivered there, his practice was to do so only occasionally, as his main work area was at a different location in the City of Hamilton. At his main location, he checked faxes regularly. As a result, the fax did not come to his attention until he checked that location on Friday, September 9, 2005.

[4] The City employer was required to have responded by September 6th, three days before the supervisor checked for faxes in the other location. Clearly, it missed the response deadline.

[5] Then, on Monday. September 12, 2005, in the absence of a response from the employer, the OLRB certified the respondent Union to represent carpenters and carpenters' apprentices employed by the City in the Industrial, Commercial and Institutional sector in the province of Ontario, and in all other sectors in Board area 26.

[6] Four weeks after receiving notice of the certification, on October 7, 2005, the City filed a request for reconsideration. On November 9, 2005, the Board declined to exercise its discretion to vary its certification decision. Much later, on January 12, 2007, the City filed a second request for reconsideration. On February 11, 2008, the Board again declined to exercise ts discretion in favour of the City.

[7] The City submits that it did not receive proper notice of the respondent Union's application for certification, and that the Board denied natural justice to the City by refusing to provide it with the opportunity to be heard or to participate in the certification process.

[8] As explained later, we find that the City was not denied natural justice.

Standard of Review

[9] The parties submitted, and we agree, that the standard of review for OLRB decisions within its area of expertise is one of reasonableness. Issues of natural justice and procedural fairness are subject to a standard of correctness and are considered contextually within all the circumstances.

The First Decision: September 12, 2005

[10] The Board's first decision was on September 12, 2005. Based on the material that was before it at that time, there is no question that the decision was reasonable. Indeed, in accordence with s. 128.1 of the *Ontario Labour* Relations *Act* (the *Act),* there were no facts before the Board that would have permitted it to reach a different result.

[11] In argument before us, the City submitted that, pursuant to s. 128. l(3)(a) of the *Act,* an employer has a statutory responsibility to provide to the Board the names of the employees in the bargaining unit proposed in the application as of the date the application is filed. Further, and more importantly for our purposes, if the employer does not provide this information, the purposes and processes of the *Act* do not permit the Board to certify a union based solely upon the information in the union's application. The Board, it is said, has a statutory duty independent of what it receives from either side, to inquire into the correctness of the information. So, in the absence of an employer's response, the Board has a statutory responsibility to take positive steps, other than relying on the union, to satisfy itself of the accuracy of the union's position. It is unreasonable, submits the City, for the Board to accept the information in the application in the absence of the employer's response. Further, says the City, the *Act* sets out detailed provisions for the exception of card-based certification involving the construction industry, and requires the Board to undertake an investigative role, such as holding a hearing under s. 128.1(6), extending the time limit for a response by the employer, or directing a representation vote bee taken under s. 128.l(13)(b) to satisfy itself of the accuracy of the unions assertions.

[12] In neither of its requests for reconsideration had this specific argument been specifically put to the Board.

[13] Section 128.1(4) of the Act provides as follows:

> On receiving an application for certification from a trade union that has elected to have its application dealt with under this section, the Board shall determine, as of the date the application is filed and on the basis of the information provided in or with the application and under subsection (3).
> (a) the bargaining unit; and
> (b) the percentage of employees in the bargaining unit who are members of the trade union.

[14] Section 128.1(3) requires the employer to provide information regarding the names of the

employees in the proposed bargaining unit within two days.

[15] The Board's interpretation of s.128.l(4) and its practice is that, in the absence of the employer's response, the Board will certify a union based upon the information in the application. The rules of the Board and the notice to the employer in the certification application form both provide that failure to respond is deemed to be acceptance of the information in the application.

[16] We do not accept the City's submission in this regard. Instead, we find that the Board's interpretation of s.l 28.1(4) is reasonable. In any event, in this instance, the Board specifically turned its mind to whether there was anything raised in the application that would cause it to consider directing a representation vote, and concluded there was nothing (para. 7).

[17] The City's proposed interpretation would have the effect of rewarding an employer for not responding and would defeat the expeditious process contemplated in the *Act*. The Legislature has set out highly prescriptive certification provisions to closely manage the certification process. Throughout the *Act,* the Legislature has made it abundantly clear what the Board can or cannot do, what it shall or it shall not do, and what it may or may not do. Nowhere in the *Act* has the Legislature said that the Board has no discretion to certify a union without first hearing from the employer. Had the Legislature intended that the Board not act exclusively upon union information, it surely would have made that clear.

The First Reconsideration Decision; November 9, 2005

[18] In its first reconsideration decision, the board relied heavily on the Union's evidence that it was the supervisor's assistant who had provided the fax number. The Board was very much alive to the issue regarding whether this information was accurate. This is borne out by paragraphs 17 and 18 of its decision on November 9th when it said:

> ....If the City can substantiate in a credible way that this fax number was not given by the assistant to [the Union's organizer) or would not have been given in response to such a general inquiry, this presents an entirely different set of circumstances.
>
> If the City disputes the assertion that [the supervisor's) assistant gave this number to [the Union's organizer), then it must make its submissions to this effect no later than November 15, 2005, including all the material facts upon which it relies.

[19] The City never availed itself of the opportunity presented by the Board. Indeed, even as of today's date, the City has provided no explanation for not responding to this invitation. Rather, the City's position seems to be that it would have been futile to respond because the Board's decision seemed to conclude that there was no merit to the City's substantive arguments.

[20] This makes no sense. First, the Board could not have been more clear in saying that if the City could provide contrary evidence, this would present "an entirely different set of circumstances." This demonstrates a willingness, not a close-mindedness, to provide the City with an opportunity to address the issue of alleged improper service. It would be meaningless for the Board to provide such an opportunity to the City, if it was not prepared to reconsider its decision if the information in question turned out to be inaccurate. Had the City provided conflicting evidence, in all likelihood the Board would have heard *viva voce* evidence to determine whether there had been proper delivery. If

the Board concluded there was no proper delivery, either the application would have been dismissed or the Board would have allowed the City to provide a full response and an opportunity to deal with the application on the merits.

[21] We do not accept that the Board would have afforded a meaningless invitation without being prepared to consider the validity of the response and to revisit the substantive issues if necessary. Accordingly, we find that not only was the Board's decision reasonable, but it was also fair, and demonstrated an openness to hearing contrary information.

The Second Reconsideration Decision: February 11, 2008

[22] The last decisions the reconsideration decision of February 11, 2008, is also reasonable. The lengthy delay in the City's second request for reconsideration was never properly explained to the Board. The Board found that the lengthy delay in filing this request for reconsideration was fatal, especially in light of the Boards rules requiring such a reconsideration to be filed within twenty days. As a result, the Board declined to exercise its discretion to allow the City's request. The Board's reasons for this decision are tenable and clearly fall "within a range of possible, acceptable outcomes which are defensible"': *Dunsmuir* v. *New Brunswick,* [2008] S.C.J. No. 9, para. 47-48.

Excessive Delay

[23] It is now over three years since the initial certification decision. The pattem of delay on the part of the City has been egregious. First, after learning of the certification by the Board on September 12, it allowed four weeks to pass before bringing an application for reconsideration. Second, as stated above, it was given time to respond to the issue of information allegedly provided by the supervisor's assistant to the Union organizer, yet never responded. Third, it allowed six months to pass before launching its application for judicial review of the first reconsideration. Then, it filed a second request for reconsideration by the Board sixteen months after the first certification decision. The City has never properly explained most of this delay.

[24] This Court has a discretion whether or not to grant the relief sought by the City. The excessive delay and conduct of the City are sufficient bases alone for denying this application.

Conclusion

The application is dismissed. Counsel for the Ontario Labour Relations Board requested that no costs be awarded for or against it. Counsel for the City and the Union agreed that costs should follow the event and should be fixed at $5,000. Accordingly, costs in the amount of *$5,000* are to be paid by the City to the respondent Union.

0769-06-ES (Court File No. 281/07) Devendranauth Misir, also known as Dev Misir –and- Mulunesh F. Agago, Joan A. Blagrove, Rosa Dalia Burbano, Ruth M. Carbajal, Doreen A. Emanuel, Libanos Getachew, Maria Delia Manzano-Gimenez, Helen Rezendes-Medeiros, Roslyn Singer, Donna Sutherland, Evelyn T. Tuazon, Amsale Worku, Edith Molna, Director of Employment Standards and Ontario Labour Relations Board

Adjournment – Employment Standards – Judicial Review – Natural Justice – The Board had refused to grant an adjournment, given the lack of consent from the respondents and the prejudice to them – The applicant had had sufficient time to seek consent and the request had nothing to do with the lack of a document – The court found, given the lateness of the request, the lack of consent, the inconvenience to the responding parties, and the reason for the request (conflicting hearing dates), the Board's decision was not a denial of natural justice – The Board's decision to proceed on the merits was a reasonable one – Application dismissed

Board decision not reported.

Superior Court of Justice (Divisional Court), Carnwath, Swinton and Ray JJ., November 24, 2008 **(Amending Judgment of October 2, 2008)**

CARNWATH J.: (Orally)

[1] The application is dismissed for oral reasons given in Court by Swinton J.

SWINTON J.

[2] The decision whether to grant an adjournment is an exercise of discretion, which is entitled to considerable deference provided the discretion of the tribunal is exercised judicially and in accordance with the principles of natural justice (see *Kalin v. College of Teachers (Ontario)* 2005 CanLII 18286 (ON S.C.D.C.), (2005), 254 D.L.R. (4th) 503 (Ont. Div.Ct.)).

[3] The Board in this case refused to grant the adjournment request, given the lack of consent from the respondents and the prejudice to them, as the individuals had taken time from work to be at the hearing. The Board observed that the applicant had had adequate time to seek their consent to an adjournment. The Board also observed that the original request for an adjournment and the oral submissions of the agent of the applicant did not base that request on the lack of access to a document in the possession of the trustee in bankruptcy.

[4] The applicant did not authorize his son, a lawyer and his agent, to act as his counsel and proceed with the hearing. The Board then dismissed his s.116 application because there was no evidence to support his request for review.

[5] The Board's decision to refuse the adjournment was a reasonable one and, in the circumstances, the applicant was not denied natural justice. The applicant knew from as early as March, 2006, when the Employment Standards Officer first requested any relevant documents, that documents proving the length of his position as a director were useful, if not necessary, to support his allegation that he was not a director of the employer company at the relevant time. The applicant had sufficient time to obtain the relevant document and failed to do so in advance of the scheduled hearing date at the Board.

[6] Considering the lateness of the request, the failure to attempt to seek consent from all parties, the inconvenience to the responding parties and the reason for the adjournment request - specifically the conflicting hearing dates - the Board's decision not to grant an adjournment was not a denial of natural justice. The Board proceeded with the hearing on the merits. The applicant, as a

lawyer, ought to have known of the inherent risk of not being prepared to proceed, should the Board deny the adjournment.

[7] The Board is charged with the responsibility of administering a comprehensive statute regulating minimum employment standards, and it is therefore in the best position to decide whether, having regard to the nature of the application before it and the respective interests of the parties, an adjournment should be granted.

[8] The Board acted reasonably in dismissing the applicant's s.116 application, given the lack of evidence to support it.

[9] Therefore, the application for judicial review is dismissed.

CARNWATH J.

[10] The application record is endorsed: "The application is dismissed for oral reasons given by Swinton J. in Court. Costs to the respondent, Director of Employment Standards, fixed at $2,500.00 inclusive of fees, disbursements and GST, payable 30 days on a partial indemnity basis."

3166-07-R (Court File No. 08-0015) Edgewater Gardens Long Term Care Centre -and- OPSEU and Ontario Labour Relations Board

Certification – Judicial Review – Representation Vote – The employer sought judicial review of a Board decision ordering a vote, arguing that it had not been served with the application for certification – The Board had found that the union faxed the application to a number provided to it by a representative of the employer – The court held the Board's decision was reasonable in the circumstances and there was no denial of natural justice – Application for judicial review dismissed

Superior Court of Justice (Divisional Court), G. Cunningham, G. Thomson and C. Hackland, October 23, 2008

REASONS FOR JUDGMENT

CUNNINGHAM, J. (Orally)

> In the present case, the Union delivered notice of the application for certification by facsimile.
>
> Rule 7.3 of the OLRB Rules sets out a number of ways in which documents must be delivered; facsimile transmission is one of them.
>
> The facsimile number used was a number at Edgewater Gardens. The fax transmission of the 41 page document was successful; and the Union received confirmation that the transmission had been successful.

Edgewater argues that the Union faxed the material to the wrong facsimile number, and that they did not receive it.

There was no information provided by the employer as to general faxes in the ordinary course of business.

The Union made inquiries at Edgewater and got a fax number for Edgewater. The number used was that of one Kim Brooks, Director of Care, Edgewater Gardens.
She says she did not receive it; and that the general fax number for Edgewater was another fax number. Employers often have a variety of fax numbers.

We are of the view that the Board's decision, in all of the circumstances, was reasonable. See Dunsmuir.

Moreover, in all of the circumstances, there was no denial of natural justice or procedural fairness.

We note that the apparent effect of the delay on the employer's receipt of the application for certification was that the normal period of time between service and the vote was only briefly truncated.

We see no merit in the application; and it is dismissed.

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING OCTOBER 2008

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

3911-07-R: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Versa Construction Limited (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of Versa Construction Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, carpenters and carpenters' apprentices in the employ of Versa Construction Limited in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non working-foreman" (2 employees in unit)

0929-08-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Jacan Investments Canada Inc. (Respondent)

Unit: "all construction labourers in the employ of Jacan Investments Canada Inc. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

1227-08-R: Christian Labour Association of Canada (Applicant) v. Lecompte Electric Inc. (Respondent)

Unit: "all employees of Lecompte Electric Inc. employed as journeyman and apprentice electricians and construction labourers in all sectors of the construction industry in the City of Ottawa and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman" (18 employees in unit)

1289-08-R: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 721 (Applicant) v. 764215 Ontario Inc. carrying on business as North Steel (Respondent)

Unit: "all ironworkers and ironworkers' apprentices in the employ of 764215 Ontario Inc. carrying on business as North Steel in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, ironworkers and ironworkers' apprentices in the employ of 764215 Ontario Inc. carrying on business as North Steel in all sectors of the construction industry in the County of Simcoe and the District Municipality of Muskoka, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit)

1330-08-R: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Lasco Electric Inc. (Respondent)

Unit: "all electricians and electricians' apprentices, all linemen and linemen apprentices, all network cabling specialists and network cabling specialists' apprentices, and communication cable installers in the employ of Lasco Electric Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, electricians and electricians' apprentices, all linemen and linemen apprentices, all network cabling specialists and network cabling specialists' apprentices, and communication cable installers in the employ of Lasco Electric Inc. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (9 employees in unit)

1370-08-R: International Union of Operating Engineers, Local 793 (Applicant) v. D.D.R. Landscape Contractors Ltd. (Respondent)

Unit: "all employees engaged in the operation of cranes, shovels, bulldozers or similar equipment, and those primarily engaged in the repairing or maintaining of same, and employees engaged as surveyors in the employ of D.D.R. Landscape Contractors Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, employees engaged in the operation of cranes, shovels, bulldozers or similar equipment, and those primarily engaged in the repairing or maintaining of same, and employees engaged as surveyors in the employ of D.D.R. Landscape Contractors Ltd. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham; in the City of Hamilton, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (7 employees in unit)

1680-08-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Consolidated Drilling and Blasting Inc. (Respondent)

Unit: "all construction labourers in the employ of the Consolidating Drilling and Blasting Inc. within a radius of 33 kilometers (approximately 20 miles) of the North Bay post office, in all sectors of the construction industry, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

1762-08-R: The International Union of Painters and Allied Trades, Local Union 114 (Applicant) v. Mar Gard Builders Limited (Respondent)

Unit: "all painters and painters' apprentices in the employ of Mar Gard Builders Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, painters and painters' apprentices in the employ of Mar Gard Builders Limited in all sectors of the construction industry in the geographic Townships of Elizabethtown, Augusta and Edwardsburg and all lands south thereof in the United Counties of Leeds and Grenville, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman." (2 employees in unit)

1794-08-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Ruddock Paving Company Limited (Respondent)

Unit: "all construction labourers in the employ of Ruddock Paving Company Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, construction labourers in the employ of Ruddock Paving Company Limited in all sectors of the construction industry in the City of Hamilton, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

1932-08-R: Labourers International Union of North America, Ontario Provincial District Council (Applicant) v. Rock Construction & Mining Inc. (Respondent)

Unit: "all construction labourers in the employ of Rock Construction & Mining Inc. in all sectors of the construction industry excluding the industrial, commercial and institutional sector in the Townships of Coleman, Temiskaming Shores, Latchford and Lorrain, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit) *(Having regard to the agreement of the parties.)*

1999-08-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Limen Masonry Limited and/or, Limen Group Ltd. and/or, Limen Masonry (2003) Inc. and/or, Limen Enterprises (2003) Inc. (Respondents)

Unit: "all construction labourers in the employ of Limen Masonry Limited and/or Limen Group Ltd. and/or Limen Masonry (2003) Inc. and/or Limen Enterprises (2003) Inc. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

2016-08-R: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Giancola Aluminum Contractors Ltd. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of Giancola Aluminum Contractors Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, carpenters and carpenters' apprentices in the employ of Giancola Aluminum Contractors Ltd. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (12 employees in unit)

2023-08-R: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Constructing Concepts Group (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of Constructing Concepts Group in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, carpenters and carpenters' apprentices in the employ of Constructing Concepts Group in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

2025-08-R: United Brotherhood of Carpenters and Joiners of America, Local 249 (Applicant) v. Gervais Motors Limited (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of Gervais Motors Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, carpenters and carpenters' apprentices in the employ of Gervais Motors Limited in all sectors of the construction industry in the geographic Townships of Elizabethtown, Augusta and Edwardsburg and all lands south thereof in the United Counties of Leeds and Grenville, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

2056-08-R: Construction Workers Local 6 affiliated with the Christian Labour Association of Canada (Applicant) v. Sundial Homes (Burl 7) Limited (Respondent)

Unit: "all construction labourers in the employ of Sundial Homes (Burl 7) Limited in all sectors of the construction industry in the City of Hamilton, the City of Burlington, that portion of the geographic Township of Beverly annexed by North Dumfries Township and that portion of the Town of Milton within the geographic Townships of Nassagaweya and Nelson, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

2057-08-R: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. 1779300 Ontario Ltd. c.o.b. as Waterford Quality Carpentry (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of 1779300 Ontario Ltd. c.o.b. as Waterford Quality Carpentry in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, carpenters and carpenters' apprentices in the employ of 1779300 Ontario Ltd. c.o.b. as Waterford Quality Carpentry in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

Bargaining Agents Certified Subsequent to Vote

1346-08-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. C.G. Maintenance & Sanitary Products Inc. (Respondent)

Unit: "all employees of C. G. Maintenance & Sanitary Products Inc. employed at City of Toronto Building, 18 Dyas Road, Toronto, Ontario, save and except supervisors and persons above the rank of supervisor, office and clerical staff" (3 employees in unit)*(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	3
Number of persons who cast ballots	3
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	3
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

1417-08-R: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Dongara Pellet Plant LP (Respondent)

Unit: "all employees of Dongara Pellet Plant LP in the City of Vaughan, save and except forepersons, persons above the rank of foreperson, office, clerical and sales staff" (13 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	11
Number of persons who cast ballots	10
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	10
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0

Number of ballots marked in favour of applicant	10
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

1730-08-R: National Automobile, Aerospace, Transportation and General Workers' Union of Canada (CAW-Canada) (Applicant) v. Northern Centre for Advanced Technology Inc. (Respondent)

Unit: "all employees of Northern Centre for Advanced Technology Inc., in the City of Greater Sudbury, save and except supervisors, persons above the rank of supervisor, office, technical and sales staff, consultants and those employees engaged in the delivery of innovation and commercialization services" (14 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	16
Number of persons who cast ballots	14
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	12
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	2
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	11
Number of ballots marked against applicant	1
Number of ballots segregated and not counted	2

1761-08-R: United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied, Industrial and Service Workers International Union (United Steelworkers) (Applicant) v. The University of Toronto (Respondent)

Unit: "all employees of the University of Toronto in the School of Continuing Studies English Language Program in the City of Toronto, save and except Program Director and those above the rank of Program Director, employees covered by a subsisting collective agreement, office staff, cultural assistants and part-time instructors" (40 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	44
Number of persons who cast ballots	32
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	20
Number of segregated ballots cast by persons whose names appear on voter's list	11
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	18
Number of ballots marked against applicant	2
Number of ballots segregated and not counted	12

1769-08-R: United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) (Applicant) v. Iron Mountain Canada Corporation (Respondent)

Unit: "all employees of Iron Mountain Canada Corporation working in and out of the City of Toronto, save and except supervisors, persons above the rank of supervisor, office, clerical, sales marketing and billing employees" (69 employees in unit) *(Clarity Note) (Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	70
Number of persons who cast ballots	69

Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	65
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	3
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	36
Number of ballots marked against applicant	33
Number of ballots segregated and not counted	0

1780-08-R: National Automobile, Aerospace, Transportation and General Workers' Union of Canada (CAW-Canada) (Applicant) v. Atlas Logistics Ajax Inc. (Respondent)

Unit: "all employees of Atlas Logistics Ajax Inc. in the Town of Ajax, ON, save and except supervisors, those among the rank of supervisor, office, clerical, sales, students employed for the summer, trainers, inventory control, quality control and bus drivers" (524 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	524
Number of persons who cast ballots	469
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	441
Number of segregated ballots cast by persons whose names appear on voter's list	25
Number of segregated ballots cast by persons whose names do not appear on voters' list	3
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	255
Number of ballots marked against applicant	185
Number of ballots segregated and not counted	28

1815-08-R: Canadian Union of Public Employees (Applicant) v. Hamilton-Wentworth District School Board (Respondent)

Unit: "all employees employed as Security Officers at Hamilton-Wentworth District School Board main office in the City of Hamilton, save and except supervisors and person above the rank of supervisor" (7 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	7
Number of persons who cast ballots	6
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	6
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	6
Number of ballots marked in favour of intervener	0
Number of ballots segregated and not counted	0

1840-08-R: Canadian Union of Allied Employees (Applicant) v. Dr. Garry Solomon (Respondent)

Unit: "all employees of Dr. Garry Solomon in the City of Belleville, save and except managers and persons above the rank of manager" (3 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	3
Number of persons who cast ballots	3
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	3
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

1875-08-R: Service Employees International Union Local 1 Canada (Applicant) v. Glynnwood Retirement Residence (Respondent)

Unit: "all employees of Glynnwood Retirement Residence in the City of Toronto save and except registered nurses, office and clerical staff (including receptionists), matrie'd (full time and part time), sales/marketing staff, recreation/activities staff, beauty salon staff, professional medical staff, physiotherapists, occupation therapists, paramedical staff, volunteers, supervisors and persons above the rank of supervisor (including any other location of Revera)" (77 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	71
Number of persons who cast ballots	61
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	61
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	36
Number of ballots marked against applicant	25
Number of ballots segregated and not counted	0

1882-08-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW - Canada) (Applicant) v. 2176542 Ontario Ltd. o/a BMW Toronto (Respondent)

Unit #1: "all employees of 2176542 Ontario Ltd. o/a BMW Toronto in the city of Toronto save and except supervisors, persons above the rank of supervisor, sales staff, tower operators, office and clerical staff." (95 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	95
Number of persons who cast ballots	92
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	84
Number of segregated ballots cast by persons whose names appear on voter's list	7
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	57
Number of ballots marked against applicant	30
Number of ballots segregated and not counted	5

1890-08-R: UNITE HERE (Applicant) v. Aramark Canada Ltd. (Respondent)

Unit: "all employees of Aramark Canada Ltd. employed at Upper Canada College, 200 Lonsdale Road, in the City of Toronto, Ontario, save and except supervisors, those above the rank of supervisors, head chef, sous chefs, office and clerical staff" (49 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	49
Number of persons who cast ballots	45
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	44
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	2
Number of spoiled ballots	1
Number of ballots marked in favour of applicant	26
Number of ballots marked against applicant	17
Number of ballots segregated and not counted	1

1906-08-R: National Automobile, Aerospace, Transportation and General Workers' Union of Canada (CAW-Canada) (Applicant) v. Americus Logistics Ajax Inc. (Respondent)

Unit: "all employees of Americus Logistics Ajax Inc. in the Town of Ajax, Ontario save and except supervisors and those above the rank of supervisor, office, clerical, sales and students employed for the summer" (110 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	110
Number of persons who cast ballots	96
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	91
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	5
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	72
Number of ballots marked against applicant	19
Number of ballots segregated and not counted	5

1911-08-R: Canadian Office and Professional Employees Union Local 343 (Applicant) v. UNITE HERE (Respondent)

Unit: "all employees employed by UNITE HERE in the Province of Ontario on the International Payroll, save and except the Canadian Director, Assistant to the Canadian Director, Organizing Supervisor/Coordinator and persons above the rank of Organizing Supervisor/Coordinator" (19 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	23
Number of persons who cast ballots	17
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	16
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	3
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	11

Number of ballots marked in favour of intervener	6
Number of ballots segregated and not counted	3

1931-08-R: United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) (Applicant) v. T.F.I. Transport 8 L.P. c.o.b. as Universal Contract Logistics (Respondent)

Unit: "all drivers of T.F.I. Transport 8 L.P. c.o.b. as Universal Contract Logistics working in and out of the City of Mississauga, save and except Logistics Manager and persons above the rank of logistics manager." (5 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	6
Number of persons who cast ballots	5
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	4
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	1
Number of ballots segregated and not counted	1

1960-08-R: United Food & Commercial Workers, Local 206 (Applicant) v. 92 Peter Street Inc. o/a Hilton Garden Inn Peter Street (Respondent)

Unit: "all employees of Hilton Garden Inn employed at 92 Peter Street, Toronto, ON, save and except assistant managers, persons above the rank of assistant managers, front desk, office, and clerical" (6 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	9
Number of persons who cast ballots	6
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	5
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	5
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	1

1970-08-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Asbury Building Services Inc. (Respondent)

Unit: "all employees of Asbury Building Services Inc. employed at 150 Eglinton Avenue East, in the City of Toronto, Ontario, save and except supervisors and persons above the rank of supervisor, office and clerical staff" (7 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	6
Number of persons who cast ballots	5
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	4
Number of segregated ballots cast by persons whose names appear on voter's list	0

Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	2

2005-08-R: United Food and Commercial Workers International Union, Local 175 (Applicant) v. 425154 Ontario Limited o/a Avon Sportswear (Respondent)

Unit: "all employees working for 425154 Ontario Limited o/a Avon Sportswear in York Region, save and except supervisors, persons above the rank of supervisor, office staff and sales staff" (19 employees in unit)

Number of names of persons on revised voters' list	0
Number of persons who cast ballots	19
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	19
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	18
Number of ballots marked against applicant	1
Number of ballots segregated and not counted	0

2007-08-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Asbury Building Services Inc. (Respondent)

Unit: "all employees of Asbury Building Services Inc. employed at 55 St. Clair Avenue West, in the City of Toronto, Ontario, save and except supervisors and persons above the rank of supervisor, office and clerical staff" (12 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	12
Number of persons who cast ballots	5
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	5
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	1
Number of ballots segregated and not counted	0

2018-08-R: Ontario Nurses' Association (Applicant) v. OMNI Healthcare Limited Partnership o/a Pleasant Meadow Manor (Respondent)

Unit: "all registered and temporarily licensed nurses employed in a nursing capacity by OMNI Healthcare Limited Partnership o/a Pleasant Meadow Manor, save and except the Director of Care and persons above the rank of Director of Care" (5 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	5
Number of persons who cast ballots	5
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	5

Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	5
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

2034-08-R: Service Employees International Union Local 1 Canada (Applicant) v. The Simcoe County Association for the Physically Disabled (Respondent)

Unit: "all employees of The Simcoe County Association for the Physically Disabled in the County of Simcoe, save and except supervisors, persons above the rank of supervisor, registered nurses, office and clerical staff" (122 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	125
Number of persons who cast ballots	97
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	97
Number of segregated ballots cast by persons whose names appear on voter's list	24
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	57
Number of ballots marked against applicant	40
Number of ballots segregated and not counted	0

2045-08-R: Canadian Union of Public Employees, Local 1281 (CUPE Local 1281) (Applicant) v. Trent Central Student Association (Respondent)

Unit: "all employees of the Trent Central Student Association in the City of Peterborough, save and except those above the rank of supervisor, those who receive an honorarium or are interns, members of the Executive of the Association and the Board of Directors" (8 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	8
Number of persons who cast ballots	7
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	7
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	3
Number of ballots segregated and not counted	0

2063-08-R: Canadian Office and Professional Employees Union Local 468 (Applicant) v. The Unity Project for Relief of Homelessness in London (Respondent)

Unit: "all employees employed by The Unity Project for Relief of Homelessness in London in the City of London, save and except the General Manager and students in co-operative education programs and those persons above the rank of General Manager." (14 employees in unit)

Number of names of persons on revised voters' list	15
Number of persons who cast ballots	15
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	15
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	8
Number of ballots marked against applicant	7
Number of ballots segregated and not counted	0

2108-08-R: Canadian Union of Public Employees (Applicant) v. Clarence-Rockland Public Library Board (Respondent)

Unit: "all employees of the Clarence-Rockland Public Library Board in the City of Rockland Ontario, Bourget Ontario, Clarence Creek Ontario, Hammond Ontario, Saint-Pascal-Baylon, Ontario, save and except supervisors and persons above the rank of supervisor" (4 employees in unit)*(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	7
Number of persons who cast ballots	5
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	5
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	2
Number of ballots segregated and not counted	0

Applications for Certification Dismissed Without Vote

3534-07-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Tri-Stucco Contractors Inc. (Respondent)

0883-08-R: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. A B & C Renovations Inc. (Respondent)

2024-08-R: Labourers' International Union of North America, Local 527 (Applicant) v. Boucher Pre-cast Concrete Limited (Respondent)

2036-08-R: UNITE HERE (Applicant) v. Kensington Place Retirement Residence (Respondent) v. United Brotherhood of Retail, Food, Industrial and Service Trades International Union (Intervener)

2065-08-R: Teamsters Local Union No. 938 (Applicant) v. Brent Packaging & Logistics Ltd. (Respondent)

Unit: "all employees of Brent Packaging & Logistics Ltd. Working in and out of 5491 Timberlea Blvd. in the City of Mississauga, in the Province of Ontario, save and except foremen and persons above the rank of foreman, students, sales, office and clerical staff" (32 employees in unit)

2097-08-R: Retail, Wholesale and Department Store Union, District Council - of the - United Food and Commercial Workers International Union (Applicant) v. Evans Lumber and Builders Supply Limited (Respondent)

Applications for Certification Dismissed Subsequent to Vote

0413-06-R: Public Service Alliance of Canada (Applicant) v. University of Western Ontario (Respondent)

Unit: "all registered graduate students of the University of Western Ontario in London, Ontario employed pursuant to a graduate research assistantship." (699 employees in unit) *(Clarity Note)*

Number of names of persons on revised voters' list	896
Number of persons who cast ballots	408
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names appear on voter's list	327
Number of segregated ballots cast by persons whose names do not appear on voters' list	81

0982-06-R: Labourers' International Union of North America Ontario Provincial District Council on its own behalf and on behalf of Labourers' International Union of North America, Local 1089 (Applicant) v. 1272054 Ontario Limited c.o.b. as Brandon Contractors (Respondent)

Unit: "all construction labourers in the employ of the responding party in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all construction labourers in the employ of the responding party in all other sectors of the construction industry in the County of Lambton, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

Number of names of persons on revised voters' list	4
Number of persons who cast ballots	4
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	4
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	2
Number of ballots segregated and not counted	0

1224-07-R: International Union of Painters and Allied Trades, Local 1891 (Applicant) v. Melandi Drywall System Inc. (Respondent)

Unit: "all painters and painters' apprentices in the employ of the responding party in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all painters and painters' apprentices in the employ of the responding party in all other sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Regional Municipality of Durham and the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, save and except non-working foremen and persons above the rank of non- working foreman For purposes of clarity the Board hereby notes that the bargaining unit set out above includes drywall tapers" (13 employees in unit) (*Clarity Note*)

3653-07-R: Service Employees International Union, Local 1.on (Applicant) v. Lord Lansdowne Retirement Residence Inc. (Respondent)

Unit: "all employees of 2095066 Ontario Inc. o/a Lord Lansdowne Retirement Residence in the City of Ottawa, Ontario, save and except Registered Nurses, office and clerical staff" (35 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	39
Number of persons who cast ballots	37
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	23
Number of segregated ballots cast by persons whose names appear on voter's list	12
Number of segregated ballots cast by persons whose names do not appear on voters' list	2
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	12
Number of ballots marked against applicant	16
Number of ballots segregated and not counted	9

3782-07-R: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Eastern Drywall (2000) Inc. (Respondent)

Unit: "all painters and painters' apprentices in the employ of the responding party in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all painters and painters apprentices in the employ of the responding party in all other sectors of the construction industry in the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria and the County of Peterborough (except for the geographic Township of Cavan), the County of Victoria (except for the geographic Township of Manvers) and the provisional County of Haliburton, save and except non-working foremen and persons above the rank of non-working foreman" (9 employees in unit) (Clarity Note)

Number of names of persons on revised voters' list	8
Number of persons who cast ballots	8
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	8
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	4
Number of ballots segregated and not counted	0

1771-08-R: International Union of Operating Engineers, Local 793 (Applicant) v. Curran Recycling Ltd. (Respondent)

Unit: "all employees of Curran Recycling Ltd., working in and out of the County of Lambton, save and except non-working forepersons and those above the rank of non-working foreperson." (8 employees in unit)

Number of names of persons on revised voters' list	11
Number of persons who cast ballots	11
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	4
Number of segregated ballots cast by persons whose names appear on voter's list	7
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0

Number of ballots marked in favour of applicant	1
Number of ballots marked against applicant	6
Number of ballots segregated and not counted	4

1826-08-R: United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) (Applicant) v. E.D. Smith Foods, Ltd. (Respondent)

Unit: "all employees of E.D. Smith Foods, Limited, in the City of Hamilton, save and except shift leaders, persons above the rank of shift leader, office, clerical and sales staff, engineering personnel, security guards, information technology personnel, research and development personnel, and students employed during the school vacation period" (297 employees in unit)

Number of names of persons on revised voters' list	259
Number of persons who cast ballots	241
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	216
Number of segregated ballots cast by persons whose names appear on voter's list	11
Number of segregated ballots cast by persons whose names do not appear on voters' list	14
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	74
Number of ballots marked against applicant	146
Number of ballots segregated and not counted	21

1913-08-R: International Association of Machinists and Aerospace Workers (Applicant) v. Stratford Plastic Components Corporation (Respondent)

Unit: "all employees of Stratford Plastic Components Corporation, in the County of Perth, save and except supervisors, persons above the rank of supervisor, office and sales staff" (118 employees in unit)

Number of names of persons on revised voters' list	111
Number of persons who cast ballots	109
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	99
Number of segregated ballots cast by persons whose names appear on voter's list	4
Number of segregated ballots cast by persons whose names do not appear on voters' list	6
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	24
Number of ballots marked against applicant	77
Number of ballots segregated and not counted	6

1945-08-R: Service Employees International Union Local 2, Brewery, General and Professional Workers' Union (Applicant) v. Nazcan Inc. o/a The Clarion Hotel and Suites Selby (Respondent)

Unit: "all employees of The Clarion Hotel & Suites Selby's, in the City of Toronto, save and except the accountant, supervisors and persons above the rank of supervisor." (19 employees in unit)

Number of names of persons on revised voters' list	20
Number of persons who cast ballots	19
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	16
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on	2

voters' list	
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	5
Number of ballots marked against applicant	11
Number of ballots segregated and not counted	3

1969-08-R: Teamsters Local Union No. 879 (Applicant) v. Tiremaster Limited (Respondent)

Unit: "all employees of Tiremaster Inc. in the Town of Ingersoll, Ontario, save and except supervisors, persons above the rank of supervisor, office, clerical and sales staff." (24 employees in unit)

Number of names of persons on revised voters' list	24
Number of persons who cast ballots	24
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	22
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	6
Number of ballots marked against applicant	16
Number of ballots segregated and not counted	2

1992-08-R: International Association of Machinists and Aerospace Workers (Applicant) v. Western Toronto International Trucks Inc. (Respondent)

Unit: "all apprentice technicians and technicians and all apprentice mechanics and mechanics employed by Western Toronto International Inc. at 7450 Torbram Road, Mississauga, Ontario, save and except supervisors and those above the rank of supervisor." (46 employees in unit)

Number of names of persons on revised voters' list	46
Number of persons who cast ballots	44
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	43
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	8
Number of ballots marked against applicant	35
Number of ballots segregated and not counted	1

2048-08-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. The Wenleigh Long Term Care Community (Respondent) v. Ontario Federation of Health Care Workers, LIUNA Local 1110 (Intervener)

Unit: "all employees employed at The Wenleigh Long Term Care Community, in the City of Mississauga, save and except supervisors and persons above the rank of supervisor, Nurse Managers, Educator, Coordinators, Registered Nurses, Office and Clerical." (180 employees in unit)

Number of names of persons on revised voters' list	196
Number of persons who cast ballots	123
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	122

Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	52
Number of ballots marked in favour of intervener	71
Number of ballots segregated and not counted	0

2049-08-R: Retail, Wholesale & Department Store Union, District Council of the United Food and Commercial Workers' International Union (Applicant) v. Rob McIntosh China Inc. (Respondent)

Unit: "all warehouse employees of Rob McIntosh China Inc. working at the warehouse located at 20369 South Service Road, South Lancaster, ON, save and except assistant managers and those above the rank of managers, operations managers, warehouse clerks, office and sales staff." (13 employees in unit)

Number of names of persons on revised voters' list	16
Number of persons who cast ballots	15
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	9
Number of segregated ballots cast by persons whose names appear on voter's list	5
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	3
Number of ballots marked against applicant	6
Number of ballots segregated and not counted	6

2126-08-R: Teamsters Local Union No. 879 (Applicant) v. St. Thomas Ford Lincoln (Respondent)

Unit: "All employees of the employer located at 1012 Talbot Street in St. Thomas, Ontario save and except supervisors, persons above the rank of supervisor, office and clerical staff and new and used car salespeople." (19 employees in unit)

Number of names of persons on revised voters' list	20
Number of persons who cast ballots	18
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	17
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	13
Number of ballots segregated and not counted	1

Applications for Certification Withdrawn

2913-06-R; 2914-06-R: International Union of Operating Engineers, Local 793 (Applicant) v. Benko Sewer Maintenance Ltd., Stan Turgeon and, Geoff Shaw (Respondents)

4102-06-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Pyramid Masonry Construction Ltd. (Respondent)

2031-07-R: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. D.A.J. Painting Ltd. (Respondent)

2421-07-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Cambridge Curbs & Sidewalks Limited (Respondent)

2723-07-R: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 721 (Applicant) v. G. Martin & A. Vleminckx Amusement Limited (Canada) (Respondent)

3888-07-R: International Union of Operating Engineers, Local 793 (Applicant) v. G. Melo Excavating Ltd. (Respondent)

1496-08-R: Canadian Union of Public Employees (Applicant) v. St. Elizabeth Health Care - Windsor Service Delivery Centre (Respondent)

1700-08-R: Professional Educational Personnel of Thames Valley (Applicant) v. Thames Valley District School Board (Respondent) v. Canadian Union of Public Employees (CUPE) Local 4222C (Intervener)

1809-08-R: Labourers' International Union of North America, Local 625 (Applicant) v. Soulliere Solutions Inc. (Respondent)

2001-08-R: United Brotherhood of Carpenters and Joiners of America, Local 1946 (Applicant) v. Hayman Construction Limited (Respondent) v. Labourers' International Union of North America, Local 1059 (Intervener)

2114-08-R: Canadian Union of Public Employees (Applicant) v. Northeastern Catholic District School Board (Respondent)

FIRST AGREEMENT - DIRECTION

0891-08-FC: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Ekum-Sekum Incorporated o/a Brantco Construction (Respondent) *(Withdrawn)*

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

3361-03-R: International Union of Bricklayers and Allied Craftworkers, Local 2 (Applicant) v. Hamlet Masonry Limited, Squire Masonry Limited, Resform Construction Ltd., Resquip Inc. c.o.b. Res Group of Companies, Res 2000 Structures Inc., and Res Precast Inc., (Respondents) *(Withdrawn)*

2410-07-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Ekum-Sekum Incorporated o/a as Brantco Construction, Cambridge Curbs & Sidewalks Limited (Respondents) *(Withdrawn)*

0090-04-R: Ontario Public Service Employees Union (Applicant) v. Ottawa Community Care Access Centre, Kaymar Rehabilitation Inc., Ottawa-Carleton Branch of the Victorian Order of Nurses and, COTA Comprehensive Rehabilitation and Mental Health Services (Respondents) *(Dismissed)*

1078-05-R: Greater Ontario Regional Council of Carpenters and Allied Trades, United Brotherhood of Carpenters Local Union 1946 (Applicant) v. Salwood General Contractors Inc. and, 1660434 Ontario Inc. (Respondents) *(Terminated)*

1847-05-R: United Brotherhood of Carpenters and Joiners of America, Local 397 (Applicant) v. Proforma Construction Inc. and, Meme Construction Co. Inc. o/a Emcon Construction (Respondents) *(Terminated)*

3290-06-R: International Union of Operating Engineers, Local 793 (Applicant) v. Core-Crete Ltd. , Con-Core Construction Ltd. (Respondents) *(Withdrawn)*

1899-07-R: Association of Management, Administrative and Professional Crown Employees of Ontario ("AMAPCEO") (Applicant) v. The Crown in Right of Ontario and, Provincial Advocate for Children and Youth (Respondents) *(Granted)*

3502-07-R: Sheet Metal Workers International Association, Local Union No. 285 (Applicant) v. D & R Heating Contractors Limited, 669857 Ontario Limited c.o.b. as Alma Mechanical (Respondents) *(Withdrawn)*

1000-08-R: Labourers' International Union of North America, Local 506 (Applicant) v. Minty-Carter Masonry Inc. and, 1701480 Ontario Inc. (Respondents) *(Granted)*

1766-08-R: Carpenters' Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Chris Noble c.o.b. as JBK Interiors (An unregistered business name) and, Hudson All Trades Inc. (Respondents) *(Granted)*

1891-08-R: International Brotherhood of Electrical Workers, Local 586 (Applicant) v. 1146557 Ontario Inc. o/a Vickers Utility Services and, Vickers Electric Limited (Respondents) *(Granted)*

SALE OF A BUSINESS

3361-03-R: International Union of Bricklayers and Allied Craftworkers, Local 2 (Applicant) v. Hamlet Masonry Limited, Squire Masonry Limited, Resform Construction Ltd., Resquip Inc. c.o.b. Res Group of Companies, Res 2000 Structures Inc., and Res Precast Inc., (Respondents) *(Withdrawn)*

0090-04-R: Ontario Public Service Employees Union (Applicant) v. Ottawa Community Care Access Centre, Kaymar Rehabilitation Inc., Ottawa-Carleton Branch of the Victorian Order of Nurses and, COTA Comprehensive Rehabilitation and Mental Health Services (Respondents) *(Dismissed)*

2574-04-R: Ontario Pipe Trades Council and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 800 (Applicant) v. 1040523 Ontario Limited c.o.b. as Norfab Metal and Machine, Norfab Construction Ltd., and/or, 1630648 Ontario Limited c.o.b. as Norfab Metal and Machine and/or, 1520247 Ontario Inc. c.o.b. as Pro Pipe Construction and/or Pro Sales Services (Respondents) *(Granted)*

1078-05-R: Greater Ontario Regional Council of Carpenters and Allied Trades, United Brotherhood of Carpenters Local Union 1946 (Applicant) v. Salwood General Contractors Inc. and, 1660434 Ontario Inc. (Respondents) *(Terminated)*

1847-05-R: United Brotherhood of Carpenters and Joiners of America, Local 397 (Applicant) v. Proforma Construction Inc. and, Meme Construction Co. Inc. o/a Emcon Construction (Respondents) *(Terminated)*

3290-06-R: International Union of Operating Engineers, Local 793 (Applicant) v. Core-Crete Ltd., Con-Core Construction Ltd. (Respondents) *(Withdrawn)*

1899-07-R: Association of Management, Administrative and Professional Crown Employees of Ontario ("AMAPCEO") (Applicant) v. The Crown in Right of Ontario and, Provincial Advocate for Children and Youth (Respondents) *(Granted)*

1000-08-R: Labourers' International Union of North America, Local 506 (Applicant) v. Minty-Carter Masonry Inc. and 1701480 Ontario Inc. (Respondents) *(Granted)*

1766-08-R: Carpenters' Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Chris Noble c.o.b. as JBK Interiors (An unregistered business name) and, Hudson All Trades Inc. (Respondents) *(Granted)*

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

0270-07-R: Ali Ozbek (Applicant) v. Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America (Respondent) v. S7 Construction and 1693036 Ontario Ltd. c/o Blackfield Drywall (Intervener) *(Granted)*

Unit: "all journeymen and apprentice carpenters, other than millwrights, engaged in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario for whom the union has bargaining rights." (2 employees in unit)

Number of names of persons on revised voters' list	2
Number of persons who cast ballots	2
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	2
Number of ballots segregated and not counted	0

1988-08-R: Adolpus Black, Ashli Anderson, Anila Shah, Hasuben Patel, Hemali Patel, Jamail Singh Nagra and Zarmina Said (Applicant) v. U F C W Canada Local 1977 (Respondent) *(Granted)*

2013-08-R: Melissa Ouellet (Applicant) v. United Food and Commercial Workers Union, Local 175 Under the Charter of the International Union of Food and Commercial Workers (Respondent) v. Supermarché de Hearst (Intervener) *(Dismissed)*

2015-08-R: Larry MacDonald, Ron Belmore, Brian Hynes and Rheal Paul (Applicant) v. United Steelworkers Local 1-1000 Wood Council (Respondent) v. Norceram Products Inc., a wholly-owned subsidiary of Dometic Corporation (Intervener) *(Granted)*

Unit: "all employees of Norceram Products Inc., a wholly owned subsidiary of Dometic Corporation, in the Village of Ingleside, save and except the following: a) Supervisor, Shift Foremen, and Lead Hand Personnel; b) Persons above the rank of Lead Hand; c) Office, Clerical, Quality Control and Sales Staff; d) Students employed during school vacation periods; and e) Security personnel and other contract services as may be employed from time to time." (4 employees in unit)

Number of names of persons on revised voters' list	4
Number of persons who cast ballots	4
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	4
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	4
Number of ballots segregated and not counted	0

2145-08-R: James Alexandre (Applicant) v. International Association of Machinists and Aerospace Workers, Local 235 (Respondent) v. The Governing Council of the University of Toronto (Intervener) *(Dismissed)*

2148-08-R: Chris Blais, Pat Gerard, Fern Girard, Dan LeMay, Chad Mactier, Sean McNamara and Ray Simard (Applicant) v. Teamsters, Chauffeurs, Warehousemen and Helpers Local Union No. 880 (Respondent) v. The Corporation of the Town of Tecumseh (Intervener) *(Granted)*

Unit: "all persons engaged as volunteer firefighters by The Corporation of the Town of Tecumseh, save and except volunteer firefighters above the rank of District Chief" (36 employees in unit)

Number of names of persons on revised voters' list	36
Number of persons who cast ballots	36
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	36
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	11
Number of ballots marked against respondent	25
Number of ballots segregated and not counted	0

2161-08-R: Employees of South River Planing Mill Inc. (Applicant) v. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers), Local 1-1000 (Respondent) v. Paul Thompson (Intervener) *(Dismissed)*

2163-08-R: Jaswinder Dhillon (Applicant) v. United Steelworkers of America Local 9042-85 (Respondent) v. Canroof Corporation Inc. (Brampton) (Intervener) *(Dismissed)*

2243-08-R: Trevor Laundrie (Applicant) v. Labourers' International Union of North America, Local 527 (Respondent) *(Dismissed)*

REFERRAL FROM MINISTER (SECTION 115 FORMERLY SECT 109)

0971-08-M: Ekum-Sekum Incorporated o/a Brantco Construction (Applicant) v. Labourers' International Union of North America, Ontario Provincial District Council and, International Union of Operating Engineers, Local 793 (Respondents) *(Withdrawn)*

APPLICATIONS FOR DECLARATION OF UNLAWFUL STRIKE

1971-08-U: Navistar Canada Inc. (Applicant) v. National Automobile, Aerospace Transportation and General Workers Union of Canada (CAW-Canada), Local 127, Joe McCabe, Aaron Neaves, Cathy Botterill, Douglas Wright, Richard Hottot, James Witherow, Larry Duquette, Ray Martin and Frank Fiala (Respondent) *(Granted)*

COMPLAINTS OF UNFAIR LABOUR PRACTICE

2938-06-U: International Union of Operating Engineers, Local 793 (Applicant) v. Benko Sewer Maintenance Ltd., Stan Turgeon and, Geoff Shaw (Respondents) *(Withdrawn)*

0540-07-U: James Temple (Applicant) v. UNITE HERE, Local 2596 (Respondent) *(Dismissed)*

1393-07-U: Labourers' International Union of North America, Local 625 (Applicant) v. Seal-On Paving Ltd. (Respondent) *(Terminated)*

1940-07-U: United Brotherhood of Carpenters and Joiners of America, Local Union 1256 (Applicant) v. United Brotherhood of Carpenters and Joiners of America (Respondent) v. Arnold Bongers, Ronald Carleton, Ronald Cole, Richard Hayes, Richard LeNeve, Robert Schenck and Herman VanVoort, as the Trustees of the Carpenters Local 1256 Pension Plan, the Carpenters Local 1256 Vacation Pay Plan and the Carpenters Local 1256 Welfare Plan (Intervener) *(Dismissed)*

2216-07-U: Elwood Austin (Applicant) v. BACU Local 31 Union (Respondent) *(Withdrawn)*

2233-07-U: Paritosh Sharma (Applicant) v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) & its Local 462 (Respondent) v. GESCO Limited Partnership (Intervener) *(Dismissed)*

2349-07-U: Yvonne Wilson (Applicant) v. District 19-Peel, Ontario Secondary Teachers' Federation (Respondent) v. Peel District School Board (Intervener) *(Dismissed)*

2372-07-U: Kevin Flood (Applicant) v. CAW/TCA Canada National Automobile, Aerospace, Transportation and General Workers Union of Canada and its Local 1090 (Respondent) v. Lear Corporation Canada Ltd. (Intervener) *(Dismissed)*

2411-07-U; 2575-07-U; 2698-07-U; 0672-08-U: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Ekum-Sekum Incorporated o/a Brantco Construction, Cambridge Curbs & Sidewalks Limited (Respondents); Labourers' International Union of North America, Local 1059 (Applicant) v. Ekum Sekum Inc. c.o.b. as Brantco Construction (Respondent); Cambridge Curbs & Sidewalks Limited (Applicant) v. Labourers' International Union of North America, Ontario Provincial District Council; Labourers' International Union of North America, Local 1081; and Sean Marlow (Respondent) v. Ekum-Sekum Incorporated o/a Brantco Construction (Intervener) *(Withdrawn)* Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Ekum-Sekum Incorporated o/a Brantco Construction (Respondent) *(Withdrawn)*

3180-07-U: Universal Workers Union Labourers' International Union of North America, Local 183 (Applicant) v. D.M. Robichaud Associates Ltd. (Respondent) *(Withdrawn)*

3450-07-U: Genet Twum (Applicant) v. C.A.W. Local 27 (Respondent) *(Dismissed)*

3451-07-U: Judy Burns (Applicant) v. The Canadian Union of Public Employees and its Local 2286.1 (Respondent) v. Windsor-Essex Children's Aid Society (Intervener) *(Dismissed)*

3643-07-U: Service Employees International Union, Local 1.on (Applicant) v. Lord Lansdowne Retirement Residence Inc. (Respondent) *(Withdrawn)*

3697-07-U: Ryerson Faculty Association (Applicant) v. Ryerson University (Respondent) *(Withdrawn)*

0484-08-U: Universal Workers Union, L.I.U.N.A, Local 183 (Applicant) v. The Toronto Humane Society (Respondent) *(Terminated)*

0542-08-U: Thelma Whittaker (Applicant) v. Universal Workers Union, L.I.U.N.A., Local 183 (Respondent) *(Dismissed)*

0642-08-U: Ontario English Catholic Teachers' Association (Applicant) v. Niagara Catholic District School Board (Respondent) *(Withdrawn)*

0646-08-U: Jeevammlar Thamalingam (Applicant) v. SEIU Local 2 Brewery, General and Professional Workers Union (Respondent) *(Withdrawn)*

0778-08-U: Brick and Allied Craft Union, Local 2 (Applicant) v. Limen Masonry Limited,, Limen Group Ltd.,, Limen Masonry (2003) Inc.,, Limen Enterprises (2003) Inc.,, Jomil Renovations Ltd. (formerly Acmar Masonry Inc.),, Acmar Group Ltd. and, Pre-Eng Contracting Ltd. (Respondents) v. Masonry Industry Employers' Council of Ontario and Ontario Masonry Contractors' Association - BACU Bargaining Committee (Intervener) *(Terminated)*

0827-08-U: Julie Desgrosseilliers (Applicant) v. Service Employees International Union (Respondent) v. North Bay General Hospital (Intervener) *(Dismissed)*

0969-08-U: Wilfred Bickford (Applicant) v. CAW-Canada Local 195 (Respondent) *(Dismissed)*

1088-08-U: Carol Labell-Mohanty (Applicant) v. Ontario Secondary School Teachers' Federation (OSSTF) (Respondent) *(Withdrawn)*

1272-08-U: Pat McIntyre (Applicant) v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW -Canada) and its Local 462 (Respondent) v. Hershey Canada Inc. (Intervener) *(Withdrawn)*

1438-08-U: Van-Tung Bui (Applicant) v. United Steelworkers (Respondent) *(Withdrawn)*

1488-08-U: Gloria Lafond (Applicant) v. Hospitality & Services Trades Union, Local 261 (Respondent) v. Royal Host Limited partnership c.o.b. as Chimo Hotel (Intervener) *(Withdrawn)*

1620-08-U: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. 2008422 Ontario Limited operating as Euro-Ex Construction (Respondent) *(Withdrawn)*

1631-08-U: Service Employees International Union Local 2, Brewery, General & Professional Workers Union (Applicant) v. Vista Security (Respondent) *(Withdrawn)*

1645-08-U: Canadian Union of Public Employees and its Local 905 (Applicant) v. Town of Markham Public Library Board (Respondent) *(Withdrawn)*

1647-08-U: Vinetta Hibbert (Applicant) v. U.F.C.W. Local 333 (Respondent) *(Terminated)*

1658-08-U: United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) (Applicant) v. Munro Concrete Products Ltd. (Respondent) *(Withdrawn)*

1667-08-U: Dr. Janet Kerekes (Applicant) v. Canadian Union Of Public Employees, Local 3904 (Respondent) *(Withdrawn)*

1677-08-U: Canadian Union of Public Employees (Applicant) v. St. Elizabeth Health Care - Windsor Service Delivery Centre (Respondent) *(Withdrawn)*

1728-08-U: International Union of Operating Engineers, Local 793 (Applicant) v. JBL Construction, (A Division of 1644472 Ontario Limited) (Respondent) *(Granted)*

1845-08-U: International Union of Operating Engineers, Local 793 (Applicant) v. Lake Excavating & Contracting Inc. (Respondent) *(Withdrawn)*

1881-08-U: Cam-Hoa (Andy) Mac (Applicant) v. Canadian Union of Postal Workers (Respondent) *(Dismissed)*

1926-08-U: Klodiana Isai (Applicant) v. Teamsters Local Union No. 647 (Respondent) v. Cara Operation Limited (Intervener) *(Dismissed)*

1934-08-U: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Erin Park Toyota (Respondent) *(Withdrawn)*

1975-08-U: Labourers' International Union of North America, Local 1059 (Applicant) v. Triple H Paving Stones Inc. and, Gary Hansford (Respondents) *(Terminated)*

1994-08-U: Marcia Matthews (Applicant) v. CUPE 966 (Respondent) *(Withdrawn)*

2027-08-U: The International Union of Painters and Allied Trades, Local Union 114 (Applicant) v. Mar Gard Builders Limited (Respondent) *(Withdrawn)*

2050-08-U: Retail, Wholesale & Department Store Union, District Council of the United Food and Commercial Workers' International Union (Applicant) v. Rob McIntosh China Inc. (Respondent) *(Dismissed)*

2186-08-U: Bill Foster (Applicant) v. Canadian Union of Public Employees Local 256 (Respondent) v. Upper Grand District School Board (Intervener) *(Terminated)*

APPLICATION FOR INTERIM ORDER

1719-08-M: Cheryl Veitch (Applicant) v. The Crown in Right of Ontario (Liquor Control Board of Ontario) (Respondent) *(Withdrawn)*

1859-08-M: Service Employees International Union Local 2 Brewery, General & Professional Workers' Union (Applicant) v. VSI Inc. o/a Vista Security and Investigations (Respondent) *(Withdrawn)*

1904-08-M: UNITE HERE (Applicant) v. Five Brothers Hospitality Partnership Limited c.o.b. Holiday Inn St. Catharines (Respondent) *(Granted)*

1938-08-M: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Erin Park Toyota (Respondent) *(Withdrawn)*

1974-08-M: Labourers' International Union of North America, Local 1059 (Applicant) v. Triple H Paving Stones Inc. and, Gary Hansford (Respondents) *(Terminated)*

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

1865-08-M: Simcoe County District School Board (Applicant) v. Ontario Public Service Employees Union and its Local 330 (Respondent) *(Granted)*

1961-08-M: Bluewater District School Board (Applicant) v. Canadian Union of Public Employees and its Local 1176 (Respondent) *(Granted)*

1984-08-M: Thames Valley District School Board (Applicant) v. Canadian Union of Public Employees and Its Local 4222D (Respondent) *(Granted)*

1985-08-M: The Waterloo Catholic District School Board (Applicant) v. Canadian Union of Public Employees (CUPE) and it's Local 2512 (Respondent) *(Granted)*

2003-08-M: The Waterloo Catholic District School Board (Applicant) v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW Canada) Local 302 (Respondent) *(Granted)*

2004-08-M: Simcoe-Muskoka Catholic District School Board (Applicant) v. Canadian Union of Public Employees and its Local 3987 (Respondent) *(Granted)*

2031-08-M: Rainbow District School Board (Applicant) v. Canadian Union of Public Employees, Local 895 (Respondent) *(Granted)*

2032-08-M: Rainbow District School Board (Applicant) v. The Ontario Public Service Employees Union, Local 614 (Respondent) *(Granted)*

2058-08-M: The Hamilton-Wentworth Catholic District School Board (Applicant) v. Canadian Union of Public Employees and its Local 3396 (Respondent) *(Terminated)*

2060-08-M: Le Conseil scolaire public du Grand Nord de l'Ontario (Applicant) v. Le Syndicat Canadien de la fonction publique (local 895) (Respondent) *(Granted)*

2095-08-M: Sudbury Catholic District School Board (Applicant) v. Canadian Union of Public Employees and its local 1369 (Respondent) *(Terminated)*

2111-08-M; 2112-08-M; 2113-08-M: Durham Catholic District School Board("The Board") (Applicant) v. Canadian Union of Public Employees, Local 218 - Educational Assistants ("The Union") (Respondent) *(Granted)*

2127-08-M; 2129-08-M: The District School Board of Niagara (Applicant) v. The Canadian Union of Public Employees Local 4156 (Office, Clerical/Technical & Instructional Support Unit) (Respondent) *(Granted)*

TRUSTEESHIP

2469-07-T: International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, its Territories and Canada (Applicant) v. International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, its Territories and Canada, Local B-173 (Respondent) *(Granted)*

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

1471-07-M: Elliot Lake and North Shore Community Legal Clinic (Applicant) v. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (Respondent) v. Carmen R. Bondy (Intervener) *(Withdrawn)*

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

0556-06-OH: Lisa Makowka (Applicant) v. MTL/Metalsmiths Accessories (Respondent) *(Withdrawn)*

1455-07-OH: Judith Dennison (Applicant) v. Toronto District School Board (Respondent) v. The Elementary Teachers' Federation of Ontario (Intervener) *(Dismissed)*

1158-08-OH: Milton Fisher (Applicant) v. Canusa-CPS (Respondent) *(Withdrawn)*

1416-08-OH: Daniel R. Cleaver (Applicant) v. Stevensville Landscaping & Lawn Service (Respondent) *(Withdrawn)*

1570-08-OH: Gordon Belowos (Applicant) v. Labour Ready, Colour By Deluxe (Respondents) *(Endorsed Settlement)*

1844-08-OH: Shewwah Yee (Applicant) v. Wok With You (Respondent) *(Withdrawn)*

CONSTRUCTION INDUSTRY GRIEVANCES

3362-03-G: International Union of Bricklayers and Allied Craftworkers, Local 2 (Applicant) v. Hamlet Masonry Limited, Squire Masonry Limited, Resform Construction Ltd., and Resquip Inc. (Respondents) *(Withdrawn)*

1848-05-G: United Brotherhood of Carpenters and Joiners of America, Local 397 (Applicant) v. Meme Construction Co. Inc. o/a Emcon Construction and, Proforma Construction Inc. (Respondents) *(Withdrawn)*

0064-07-G; 0552-07-G: Carpenters and Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Proplus Construction & Renovation Inc. (Respondent); Drywall Acoustic and Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Proplus Construction & Renovation Inc. (Respondent) *(Endorsed Settlement)*

1938-07-G: Greater Ontario Regional Council of Carpenters, Drywall and Allied Workers, Local Union 93 (Applicant) v. Modulfab Inc. (Respondent) *(Endorsed Settlement)*

2390-07-G: Labourers' International Union of North America, Ontario Provincial District Council on its own behalf and on behalf of Labourers' International Union of North America Local 493 (Applicant) v. Carillion Canada Inc. (Respondent) *(Withdrawn)*

3322-07-G: Labourers' International Union of North America, Local 506 (Applicant) v. Ellis-Don Construction Ltd. (Respondent) *(Withdrawn)*

0237-08-G; 0779-08-G: Brick and Allied Craft Union of Canada, Local 2 (Applicant) v. Limen Masonry Limited, Limen Group Ltd., Limen Masonry (2003) Inc., Limen Enterprises (2003) Inc., Jomil Renovations Ltd. (formerly Acmar Masonry Inc.) and, Acmar Group Ltd. (Respondents) *(Terminated)*

0652-08-G: Labourers International Union of North America, Local 1081 (Applicant) v. Ekum-Sekum Incorporated operating as Brantco Corporation (Respondent) *(Withdrawn)*

1145-08-G: Labourers' International Union of North America, Local 527 (Applicant) v. Coram Construction Group (Respondent) *(Terminated)*

1201-08-G: International Union of Elevator Constructors, Local 96 (Applicant) v. KONE Inc. (Respondent) *(Withdrawn)*

1281-08-G: International Brotherhood of Electrical Workers, Local 894 (Applicant) v. Gridd Electrical Services Inc. (Respondent) *(Withdrawn)*

1494-08-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 787 (Applicant) v. AC Plus Inc. (Respondent) *(Granted)*

1501-08-G: International Brotherhood of Electrical Workers, Local 586 (Applicant) v. 1146557 Ontario Inc. o/a Vickers Utility Services (Respondent) *(Granted)*

1548-08-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 599 (Applicant) v. Looby Mechanical Inc. (Respondent) *(Withdrawn)*

1552-08-G: Greater Ontario Regional Council of Carpenters, Drywall and Allied Workers, Local Union 93 (Applicant) v. 1716616 Ontario Limited C.O.B. Capco Construction (Respondent) *(Endorsed Settlement)*

1565-08-G: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 599 (Applicant) v. Looby Mechanical Inc. (Respondent) *(Withdrawn)*

1625-08-G: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Millenium Drywall Inc. (Respondent) *(Endorsed Settlement)*

1639-08-G: Carpenters & Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Riverton Forming Inc. and, Franco Fontana (Respondents) *(Granted)*

1703-08-G: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Formcrete Structural Ltd. (Respondent) *(Endorsed Settlement)*

1767-08-G: Carpenters' Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Hudson All Trades Inc. (Respondent) *(Withdrawn)*

1783-08-G: Labourers' International Union of North America, Local 506 (Applicant) v. E.S. Fox Ltd. (Respondent) *(Withdrawn)*

1807-08-G: Labourers' International Union of North America, Local 506 (Applicant) v. C.A.P. Concrete Structures Ltd. (Respondent) *(Withdrawn)*

1908-08-G: Carpenters & Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Rocan Construction Ltd. and, Janine Campbell (Respondents) *(Endorsed Settlement)*

1918-08-G: Labourers' International Union of North America, Local 527 (Applicant) v. St.Lawrence Concrete Works (Respondent) *(Granted)*

1930-08-G: International Union of Bricklayers and Allied Craftworkers, Local 7 (Applicant) v. Presto Construction Inc. (Respondent) *(Granted)*

1936-08-G: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local 128 (Applicant) v. Enviro-Tank Inc., Alberto Giammarino, Director and, Douglas Warneke, Director (Respondents) *(Granted)*

1941-08-G: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. 1473157 Ontario Inc. c.o.b. as Kanadian Fireproofers (Respondent) *(Granted)*

1946-08-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. Valley View Contracting Ltd. (Respondent) *(Terminated)*

1949-08-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. 635066 Ontario Ltd. c.o.b. as Diversified Electro - Technical Services (Respondent) *(Terminated)*

1986-08-G: The International Union of Painters and Allied Trades, Local Union 557 (Applicant) v. G-Tec Painting Limited and, Pheonix Painting Limited (Respondents) *(Endorsed Settlement)*

1989-08-G: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Skywall Systems Inc. and The Sky Construction Inc. (Respondent) *(Granted)*

1990-08-G: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Inex Drywall Limited (Respondent) *(Granted)*

1995-08-G: International Brotherhood of Electrical Workers, Local 120 (Applicant) v. Finan Homes Services Ltd. (Respondent) *(Endorsed Settlement)*

2017-08-G: U.A. Local 853 Sprinkler Fitters of Ontario (Applicant) v. Depend-All Fire Systems Inc. (Respondent) *(Granted)*

2022-08-G: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. 2087265 Ontario Inc. o/a Mega Painting & Decor (Respondent) *(Granted)*

2055-08-G; 2135-08-G: International Brotherhood of Electrical Workers, Local 804 (Applicant) v. Danco Electric Inc. (Respondent) *(Withdrawn)*

2066-08-G: Carpenters' Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. D & H Custom Woodworking Ltd. (Respondent) *(Granted)*

2099-08-G: Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Ivanco Construction Ltd. (Respondent) *(Withdrawn)*

2101-08-G: International Union of Operating Engineers, Local 793 (Applicant) v. Amherst Concrete Pumping Ltd. (Respondent) *(Withdrawn)*

2155-08-G: Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Formcrete Structural Ltd. (Respondent) *(Granted)*

2156-08-G: International Brotherhood of Electrical Workers, Local 105 (Applicant) v. Black & McDonald Limited (Respondent) *(Withdrawn)*

2157-08-G: Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. R. Baun Construction Inc. (Respondent) *(Granted)*

2160-08-G: Carpenters & Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Yustin Interiors Ltd. (Respondent) *(Granted)*

2184-08-G: International Union of Operating Engineers, Local 793 (Applicant) v. Bianchi Contracting (2004) Inc. (Respondent) *(Granted)*

2185-08-G: International Union of Operating Engineeers, Local 793 (Applicant) v. Bianchi Contracting (2004) Inc. (Respondent) *(Granted)*

2187-08-G: Sheet Metal Workers' International Association, Local 537 (Applicant) v. Medcon Mechanical Ltd. (Respondent) *(Granted)*

2188-08-G: Sheet Metal Workers' International Association, Local 537 (Applicant) v. Medcon Mechanical Ltd. (Respondent) *(Granted)*

2189-08-G: Sheet Metal Workers' International Association, Local 537 (Applicant) v. Aggressive Metals Inc. (Respondent) *(Granted)*

2190-08-G: Sheet Metal Workers' International Association, Local 537 (Applicant) v. Aggressive Metals Inc. (Respondent) *(Granted)*

2200-08-G: International Brotherhood of Electrical Workers, Local 894 and International Brotherhood of Electrical Workers, Local 105 (Applicant) v. AXA Electric Inc. (Respondent) *(Granted)*

2202-08-G: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 736 (Applicant) v. 1257132 Ontario Ltd. o/a PM Designs (Respondent) *(Granted)*

2211-08-G: Universal Workers Union, L.I.U.N.A. Local 183 (Applicant) v. Silver Streams Homes Inc. (Respondent) *(Withdrawn)*

2238-08-G: The United Brotherhood of Carpenters & Joiners of America, Local 93 (Applicant) v. Moniz Forming Inc. (Respondent) *(Granted)*

2287-08-G: The International Union of Painters and Allied Trades, Local Union 1819 (Applicant) v. Youngs Architectural Glazing Ltd. (Respondent) *(Withdrawn)*

APPEALS - EMPLOYMENT STANDARDS ACT

4056-05-ES: Greater Ontario Regional Council of Carpenters, Drywall and Allied Workers, Local 1988 (Applicant) v. Anna Rees, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

4087-06-ES: Gordon Ian Patterson, a Director of FTI International Inc. (Applicant) v. Zhe Hungfu and Director of Employment Standards (Respondents) *(Withdrawn)*

0217-07-ES: Frank Caputo (Applicant) v. Achievement House Inc., and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1302-07-ES: Club T-Zers/T.T. Bar (Applicant) v. Crystal-Dawn Pace and, Director of Employment Standards (Respondents) *(Withdrawn)*

1477-07-ES: Commercial Spring and Tool Company Limited (Applicant) v. Hartmut (Hardy) Rohn and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1630-07-ES: 3951057 Canada Inc. o/a Le Biftheque (Applicant) v. Natasha Kruplinicki and Director of Employment Standards (Respondents) *(Granted)*

2101-07-ES: Robert McLaughlin (Applicant) v. Graphite Specialty Products Inc. and/or Ferns Golf & Country Club and Director of Employment Standards (Respondents) *(Granted)*

2464-07-ES: Krista Leblanc (Applicant) v. Troup Group of Companies and Director of Employment Standards (Respondents) *(Withdrawn)*

2490-07-ES: Jennifer Morin (Applicant) v. Busy Kids Childcare Inc. and Director of Employment Standards (Respondents) *(Dismissed)*

2617-07-ES: Ingrid McCarthy a Director of McCarthy Hospitality Inc. (Applicant) v. Jason L. Beatty, Donna C. Stainthorpe, Mark A. Taylor, Leigh A. Reid and Director of Employment Standards (Respondents) *(Terminated)*

2639-07-ES: LSI North America Ltd. (Applicant) v. Tracy Peden and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3033-07-ES: Metalworks Institute Inc. (Applicant) v. Jude Angione and Director of Employment Standards (Respondents) *(Granted)*

3042-07-ES: C.M. Takacs Holdings Corporation (Applicant) v. Shannon Clarke and Director of Employment Standards (Respondents) *(Dismissed)*

3095-07-ES: Bruce Robinson (Applicant) v. GasTOPS Ltd. and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3133-07-ES: Michael Chan (Applicant) v. Rehab Express Inc. o/a Closing the Gap Healthcare Group and Director of Employment Standards (Respondents) *(Dismissed)*

3238-07-ES: Juan Antonio Ovidio Reyes (Applicant) v. Supply Chain Management and Director of Employment Standards (Respondents) *(Terminated)*

3244-07-ES: Patene Building Supplies Ltd. (Applicant) v. David Landry and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3256-07-ES: Four Star Dairy Limited (Applicant) v. Antonio (Tony) Flor and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3342-07-ES: Prabhakar Shanmugam (Applicant) v. Eurospec Manufacturing Inc. and, Director of Employment Standards (Respondents) *(Dismissed)*

3396-07-ES: Graeme Rae, carrying on business as Green Team Cleaning Service (Applicant) v. Michael Jim Ramsey and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3712-07-ES: Dr. Haltrecht Orthodontic Office (Applicant) v. Sabryna Gillis and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3751-07-ES: Qingrong Qiu (Applicant) v. Eagle Precision Technologies Ltd. and, Director of Employment Standards (Respondents) *(Dismissed)*

3776-07-ES: Tasi Orfanos (Applicant) v. New Zealand Lamb Company Ltd./La Compagnie D'Agneau De La Nouvelle Zelande Ltee and/or Australian Lamb Company Ltd. and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3799-07-ES: Vince Burnett (Applicant) v. Employers First, and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3902-07-ES: Colleen McElhone-Babenko a director of Contran Manufacturing (1982) Limited (Applicant) v. Mr. Keith Monk, Mr. Paul Cushman, Mr. Steve Gibson, Mr. Wayne Martin, Mr. James Honsinger, Ms. Laura Gillespie, Mr. Verlyn Lanning, Mr. Robert Rose, Mr. Michael Lewis, Mr. Timothy Caudle, Mr. Terry Vannatter, Mr. Michael Langford, Mr. Kyle Tallman, Mr. Mark Leeper, Mr. Matthew Maynard, Mr. Ron Pellerin, Mr. Lee Grant, Mr. Michael Cripps, Mr. John Gillespie, Ms. Barbara Calvert, Ms. Sandy Martin, Mr. Ian Vella , Mr. Peter Cyr, Ms. Teresa Castillo, Mr. John DeBeck and, Director of Employment Standards (Respondents) *(Granted)*

0160-08-ES: Central Welding & Iron Works (Applicant) v. Jody Fountain and Director of Employment Standards (Respondents) *(Withdrawn)*

0279-08-ES: Dhanraj Meraram (Applicant) v. One Contact Canada Inc. and Director of Employment Standards (Respondents) *(Dismissed)*

0299-08-ES: Hernando Otalora (Applicant) v. Timothy Howard Foster & Anne Monique Foster o/a Foster's Farm and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

0422-08-ES: Deacro Industries Ltd. (Applicant) v. Rodney Chamberlain and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

0471-08-ES: 2014647 Ontario Ltd. o/a The Black Dog Pub (Applicant) v. Shawna Williscroft and Director of Employment Standards (Respondents) *(Dismissed)*

0494-08-ES: Ish Jindal (Applicant) v. Easton's Group of Hotels Inc., and Director of Employment Standards (Respondents) *(Withdrawn)*

0529-08-ES: Melissa Barker (Applicant) v. Private Pleasures Ltd. and Director of Employment Standards (Respondents) *(Withdrawn)*

0551-08-ES: Sign A Rama (Applicant) v. Brenda Kelly, and, Director of Employment Standards (Respondents) *(Dismissed)*

0584-08-ES: In Touch Retirement Living for Vegetarian/Vegans Inc. (Applicant) v. Michelle Buckley and Director of Employment Standards (Respondents) *(Granted)*

0612-08-ES: Martina Hava (Applicant) v. Timiskaming Health Unit and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

0621-08-ES: Universal Energy Corporation (Applicant) v. Kenyetta N. Swaby and Director of Employment Standards (Respondents) *(Dismissed)*

0622-08-ES: 2104882 Ontario Inc. o/a Diamond Grill (Applicant) v. Donna Pidgeon and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

0665-08-ES: Palestra Painting & Contracting (Applicant) v. David Rowley and Director of Employment Standards (Respondents) *(Withdrawn)*

0686-08-ES: Kwok Hung Cheng (Applicant) v. Viva Magnetics (Canada) Limited and Director of Employment Standards (Respondents) *(Dismissed)*

0713-08-ES: ACT Teleconferencing Canada Incorporated (Applicant) v. John Burns and Director of Employment Standards (Respondents) *(Withdrawn)*

0801-08-ES: Douglas A. Small a Director of Bridgetech Systems Inc. (Applicant) v. Farah Yu and Director of Employment Standards (Respondents) *(Terminated)*

0862-08-ES: George F. McFadyen (Applicant) v. Pamela Ceschan and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

0945-08-ES: Harster Greenhouses Inc. (Applicant) v. Robert Whitmore and Director of Employment Standards (Respondents) *(Granted)*

0958-08-ES: Kamal Surana (Applicant) v. Medical Technology Institute (MTI), and Director of Employment Standards (Respondents) *(Granted)*

0963-08-ES: Ontario Lottery and Gaming Corporation Mohawk Raceway (Applicant) v. Janet Lepine, and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1020-08-ES: Elite Machine and Gear Inc. (Applicant) v. Rob Yost, and Director of Employment Standards (Respondents) *(Withdrawn)*

1027-08-ES: Diahann Boothe (Applicant) v. Robertson Human Asset Management Inc. and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1105-08-ES: Marcel Motors Ltd. (Applicant) v. Marc-André Godin and Director of Employment Standards (Respondents) *(Granted)*

1174-08-ES: Jeff Edwards (Applicant) v. Casino Rama Services Inc. and, Director of Employment Standards (Respondents) *(Endorsed Settlement)* 1185-08-ES: Yin Ling Wong (Applicant) v. King Cole Ducks Limited and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1241-08-ES: Mohammad Hakamian (Applicant) v. CDI Computer Dealers Inc. and Director of Employment Standards (Respondents) *(Terminated)*

1262-08-ES: Sobeys Capital Incorporated o/a Sobeys Ontario (Applicant) v. Ester Rokach and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1355-08-ES: Dan J. Hogan (Applicant) v. 1680985 Ontario Inc. o/a Kingspoint Tire & Auto Service Center, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1369-08-ES: Nazvir Fareed (Applicant) v. Cross and Company Inc. c.o.b. as Baskin Robbins Ice Cream, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1536-08-ES: Delta Disposal Systems Ltd. (Applicant) v. John Bird, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1603-08-ES: Labh Barhma (Applicant) v. All Rail Transport Inc. o/a Manna Transport Inc., Director of Employment Standards (Respondents) *(Dismissed)*

1606-08-ES: Stana Todorcevic (Applicant) v. ROI Engineering Inc., and Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1734-08-ES: Anders A. Holteng, a director of Canada Wood Specialties Inc. (Applicant) v. Scott Austin, Betty Beach, Lorne Beemer, Lise Bueauchemin, Stephen Bursey, The Estate of Ira A. Cleaveley, Ed Dolan, Marlyn English, Holly Hand, Thomas Hendry, Luke Johnston, Donald Joseph, Murray Langley, Rob Merritt, Darcy Osborne, Gary Rigarlsford, William J. Rolston, Terri Thornton, Blaine Tinney and Director of Employment Standards (Respondents) *(Terminated)*

1747-08-ES: Taras Hoysak (Applicant) v. Ontario Food Terminal Board, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1750-08-ES: King Capital Group Inc. (Applicant) v. Dianne P Man, Director of Employment Standards (Respondents) *(Terminated)*

1765-08-ES: Barbara Simpson (Applicant) v. Director of Employment Standards (Respondent) *(Withdrawn)*

1793-08-ES: Jason Vieira, a director of Canada Wood Specialties Inc. (Applicant) v. Scott Austin, Betty Beach, Lorne Beemer, Lise Bueauchemin, Stephen Bursey, The Estate of Ira A. Cleaveley, Ed Dolan, Marlyn English, Holly Hand, Thomas Hendry, Luke Johnston, Donald Joseph, Murray Langley, Rob Merritt, Darcy Osborne, Gary Rigarlsford, William J. Rolston, Terri Thornton, Blaine Tinney and, Director of Employment Standards (Respondents) *(Terminated)*

1825-08-ES: McVannell Transport (Applicant) v. Director of Employment Standards (Respondent) *(Terminated)*

1831-08-ES: Glen Mercer (Applicant) v. Parts Source (Formally Napa Auto Parts Niagara) and Director of Employment Standards (Respondents) *(Terminated)*

1857-08-ES: Unitex Apparel Ltd. (Applicant) v. Director of Employment Standards (Respondent) *(Terminated)*

1897-08-ES: F.C.M. Construction Limited (Applicant) v. Thurman Green, Director of Employment Standards (Respondents) *(Dismissed)*

1977-08-ES: 1714543 Ontario Inc. o/a Airport Strip Club (Applicant) v. Tammy Degroot and Director of Employment Standards (Respondents) *(Dismissed)*

1978-08-ES: 1714543 Ontario Inc. o/a Airport Strip Club (Applicant) v. Raylene Pardy and Director of Employment Standards (Respondents) *(Dismissed)*

1979-08-ES: 1714543 Ontario Inc. o/a Airport Strip Club (Applicant) v. Michelle Dzialakiewicz and Director of Employment Standards (Respondents) *(Dismissed)*

1980-08-ES: 1714543 Ontario Inc. o/a Airport Strip Club (Applicant) v. Klaudia Dynowska and Director of Employment Standards (Respondents) *(Dismissed)*

2009-08-ES: The Salon & Spa at 160 (Applicant) v. Rebecca Joyce and Director of Employment Standards (Respondents) *(Dismissed)*

2014-08-ES: Organic Garage Ltd (Applicant) v. Kathryn Scott, Director of Employment Standards (Respondents) *(Dismissed)*

2039-08-ES: 1635586 Ontario Inc. o/a Niagara Thunder Car Wash 2005 (Applicant) v. John Barillier and Director of Employment Standards (Respondents) *(Dismissed)*

2064-08-ES: Dengru Wu (Applicant) v. The Corporation of the City of Cambridge (Respondent) *(Dismissed)*

2105-08-ES: Turbopromote Inc. (Applicant) v. Matthew D. White and Director of Employment Standards (Respondents) *(Dismissed)*

APPEALS - OCCUPATIONAL HEALTH AND SAFETY ACT

2623-03-HS: Melody Sylvestre (Applicant) v. Corporation of the City of Toronto and Leo Tse, Inspector (Respondents) *(Withdrawn)*

1009-08-HS: Guild Electric Limited (Applicant) v. International Brotherhood of Electrical Workers, Local 353 and Goran Blanusa, Inspector (Respondents) *(Withdrawn)*

1111-08-HS: Canadian Tire Corporation Limited (Applicant) v. Steven Lanteigne and Darren O'Dell, Inspector (Respondents) *(Withdrawn)*

1127-08-HS: Nadalin Electric Co. (Ont.) Inc. (Applicant) v. Kelvin Legree, Brian Yasvinski, Inspector (Respondents) *(Withdrawn)*

1422-08-HS: ACCO Brands Canada Inc. (Applicant) v. Employees of ACCO Brands Canada Inc. and Communications Energy and Paperworkers Union and Joe Zaher, Inspector (Respondents) *(Withdrawn)*

1695-08-HS: Alana Merritt and Heather Cook, O/A Rooms in Bloom (Applicant) v. Mary (May) Reid, Corey Riddall, OnCore Flooring and Installations c/o The Estate of Ron Pilon, Allen Cesekas, Inspector Provincial Offences (Respondents) *(Withdrawn)*

1877-08-HS: Home Depot of Canada Inc. (Applicant) v. Associates at the Home Depot Store and Reg Pilon, Inspector (Respondents) *(Dismissed)*

1919-08-HS: Alana Merritt and Heather Cook, O/A "Rooms in Bloom" (Applicant) v. Mary (May) Reid , Corey Riddall, OnCore Flooring and Installations c/o The Estate of Ron Pilon and Allen Cesekas, Inspector Provincial Offences (Respondents) *(Withdrawn)*

PUBLIC SECTOR LABOUR RELATIONS TRANSITION ACT, 1997

0530-08-PS: Ontario Public Service Employees Union (Applicant) v. Ottawa Children's Treatment Centre and, Children's Hospital of Eastern Ontario (Respondents) v. Ontario Nurses' Association (Intervener) *(Granted)*

SECTOR DETERMINATION

2940-07-M: 698806 Ontario Inc. c.o.b. as Gap Construction Co. Ltd. (Applicant) v. International Union of Operating Engineers, Local 793 (Respondent) v. Labourers' International Union of North America, Local 493, Interpaving Limited, Sudbury Construction Association (Interveners) *(Withdrawn)*

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

2029-05-ES: Xiao Feng Fu (Applicant) v. Unitedge Inc. and, Director of Employment Standards (Respondents) *(Dismissed)*

0491-07-ES: Mark Tippen (Applicant) v. Allcrete Property & Road Services Inc. and, Director of Employment Standards (Respondents) *(Dismissed)*

1145-07-U: Austin Elias, Nancy Gauvin, Alison Hepburn, Bob Crowther (Applicant) v. The Ontario Secondary School Teachers' Federation (Respondent) v. Toronto District School Board (Intervener) *(Dismissed)*

2160-07-ES: Regis Hairstylists, Ltd. (Applicant) v. Tammy Cooney and, Director of Employment Standards (Respondents) *(Dismissed)*

3324-07-U: Jim Sedore and Sandra Sedore (Applicant) v. United Steelworkers, Local 889 (Respondent) *(Dismissed)*

3380-07-ES: Chef Patrick's Ma Maison (Applicant) v. Laurent Fenouil and, Director of Employment Standards (Respondents) *(Dismissed)*

1544-08-R: National Automobile, Aerospace, Transportation and General Workers' Union of Canada (CAW-Canada) (Applicant) v. Waste Management (Respondent) v. Big Bear Employees' Association (Intervener) *(Withdrawn)*

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APPLICATIONS DISPOSED OF BY THE ONTARIO LABOUR RELATIONS BOARD DURING NOVEMBER 2008

APPLICATIONS FOR CERTIFICATION

Bargaining Agents Certified Without Vote

0785-07-R: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Atria Development Corporation and Parliament Building Group Inc. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of Atria Development Corporation and Parliament Building Group Inc. in all sectors of the construction industry in the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

1109-07-R: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. M.C.M. Contracting Limited (Respondent)

Unit: "all painters and painters' apprentices in the employ of M.C.M. Contracting Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all painters and painters' apprentices in the employ of M.C.M. Contracting Limited in all other sectors of the construction industry in the County of Brant and that portion of the Regional Municipality of Haldimand Norfolk coming within the former County of Norfolk, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit) (*Clarity Note)*

3154-07-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Havenwod Homes Limited (Respondent)

Unit: "all construction labourers in the employ of Havenwood Homes Limited in all sectors of the construction industry in the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, and the County of Simcoe and the District Municipality of Muskoka, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non working foreman" (2 employees in unit)

3503-07-R: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Penalta Group Ltd. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of Penalta Group Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of Penalta Group Ltd. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, the County of Peterborough (except for the geographic Township of Cavan), the County of Victoria (except for the geographic Township of Manvers) and the provisional County of Haliburton, the County of Lennox and Addington, the County of Frontenac, and the geographic Townships of Rear Leeds and Lansdowne, Rear of Yonge and Escott, and all lands south thereof in the United Counties of Leeds and Grenville, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

0332-08-R: United Brotherhood of Carpenters and Joiners of America, Local 2486 (Applicant) v. Dialcon Installations Inc. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of Dialcon Installations Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of Dialcon Installations Inc. in all sectors of the construction industry in within a radius of 33 kilometers (approximately 20 miles) of the North Bay post office, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

0511-08-R: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. 4373413 Canada Inc. c.o.b. Canadian Masonry Corporation (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of 4373413 Canada Inc. c.o.b. Canadian Masonry Corporation in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all carpenters and carpenters' apprentices in the employ of 4373413 Canada Inc. c.o.b. Canadian Masonry Corporation in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

0912-08-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. White Contracting Ltd. (Respondent)

Unit: "all construction labourers in the employ of White Contracting Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of White Contracting Ltd. in all sectors of the construction industry in the District of Thunder Bay, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

1804-08-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Four Seasons Site Development Ltd. (Respondent)

Unit: "all construction labourers in the employ of the responding party in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, in all sectors of the construction industry other than the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (12 employees in unit)

2042-08-R: IBEW Construction Council of Ontario (Applicant) v. 1450871 Ontario Limited c.o.b. as All-Tech Services (Respondent)

Unit: "all electricians and electricians' apprentices, all linemen and linemen apprentices, all network cabling specialists and network cabling specialists' apprentices, and communication cable installers in the employ of 1450871 Ontario Limited c.o.b. as All-Tech Services in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman all electricians and electricians' apprentices, all linemen and linemen apprentices, all network cabling specialists and network cabling specialists' apprentices, and communication cable installers in the employ of 1450871 Ontario Limited c.o.b. as All-Tech Services in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham and the County of Dufferin, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (22 employees in unit)

2255-08-R: Labourers' International Union of North America, Local 625 (Applicant) v. Souillere Solutions Inc. (Respondent)

Unit: "all construction labourers in the employ of Soulliere Solutions Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non working foreman all construction labourers in the employ of Soulliere Solutions Inc. in all sectors of the construction industry in the Counties of Essex and Kent, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non working foreman" (7 employees in unit)

2263-08-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Pachecos Contractors Ltd. (Respondent)

Unit: "all construction labourers in the employ of Pachecos Contractors Ltd. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non working foreman all construction labourers in the employ of Pachecos Contractors Ltd. in all sectors of the construction industry in the County of Brant and that portion of the Regional Municipality of Haldimand-Norfolk coming within the former County of Norfolk, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non working foreman" (4 employees in unit)

2281-08-R: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Terra Structures Inc. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of Terra Structures Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non working foreman all carpenters and carpenters' apprentices in the employ of Terra Structures Inc. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non working foreman" (4 employees in unit)

2282-08-R: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. DM Precision Contractors Inc. (Respondent)

Unit: "all carpenters and carpenters' apprentices in the employ of DM Precision Contractors Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, save and except non-working foremen and persons above the rank of non-working foreman all carpenters and carpenters' apprentices in the employ of DM Precision Contractors Inc. in all sectors of the construction industry in the Regional Municipality of Durham (except for the Towns of Ajax and Pickering), the geographic Township of Cavan in the County of Peterborough and the geographic Township of Manvers in the County of Victoria, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (2 employees in unit)

2334-08-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Lafarge Canada Inc. and/or Lafarge Paving & Construction Limited (Respondent)

Unit: "all construction labourers in the employ of Lafarge Canada Inc. in all sectors of the construction industry in the County of Simcoe and the District Municipality of Muskoka, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (20 employees in unit)

2392-08-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Trinity Contracting & Landscaping Ltd. (Respondent)

Unit: "all construction labourers in the employ of Trinity Contracting & Landscaping Ltd., in all sectors of the construction industry in the Regional Municipality of Waterloo (except that portion of the geographic Township of Beverly annexed by North Dumfries Township), excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non working foreman" (6 employees in unit)

2410-08-R: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Erinwall Decorating Limited (Respondent)

Unit: "all painters and painters' apprentices in the employ of Erinwall Decorating Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all painters and painters' apprentices in the employ of Erinwall Decorating Limited in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (17 employees in unit)

2421-08-R: Labourers International Union of North America, Ontario Provincial District Council (Applicant) v. Tectonic Infrastructure Inc. (Respondent)

Unit: "all construction labourers in the employ of Tectonic Infrastructure Inc. in all sectors of the construction industry in the County of Grey, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

2492-08-R: The International Union of Painters and Allied Trades, Local Union 557 (Applicant) v.Blue Sky Decorating Group Inc. and/or Blue Sky Decorating Limited (Respondent)

Unit: "all painters and painters' apprentices in the employ of Blue Sky Decorating Group Inc. and/or Blue Sky Decorating Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and painters' apprentices in the employ of Blue Sky Decorating Group Inc. and/or Blue Sky Decorating Limited in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (3 employees in unit)

2507-08-R: Sheet Metal Workers' International Association, Local 30 (Applicant) v. Anfield Air Limited (Respondent)

Unit: "all sheet metal workers, sheet metal workers' apprentices, sheeters, sheeters' assistants and material handlers in the employ of Anfield Air Limited in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all sheet metal workers, sheet metal workers' apprentices, sheeters, sheeters' assistants and material handlers in the employ of Anfield Air Limited in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (6 employees in unit)

2564-08-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Avcon Construction Inc. (Respondent)

Unit: "all construction labourers in the employ of Avcon Construction Inc. in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario, and all construction labourers in the employ of Avcon Construction Inc. in all sectors of the construction industry in the Regional Municipality of Niagara and that portion of the Regional Municipality of Haldimand Norfolk coming within the former County of Haldimand, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (16 employees in unit)

Bargaining Agents Certified Subsequent to Vote

0514-04-R: Construction Workers Local 6 Affiliated with Christian Labour Association of Canada (Applicant) v. JLY Electric Ltd. (Respondent) v. International Brotherhood of Electrical Workers, Local 105, and I.B.E.W. Construction Council of Ontario (Intervener)

Unit: "all electricians and electricians' apprentices in the employ of JLY Electric Ltd. in all sectors of the construction industry in the City of Toronto, the Regional Municipalities of Peel and York, the Towns of Oakville and Halton Hills and that portion of the Town of Milton within the geographic Townships of Esquesing and Trafalgar, and the Towns of Ajax and Pickering in the Regional Municipality of Durham, excluding the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non-working foreman" (5 employees in unit)

Number of names of persons on revised voters' list	5
Number of persons who cast ballots	5
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	5
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list.	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	5
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

3418-06-R: Sheet Metal Workers' International Association, Local 51 (Applicant) v. 413554 Ontario Limited c.o.b. Chouinard Bros. Roofing (Respondent) v. Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Intervener)

Unit: "all employees [of 413554 Ontario Limited c.o.b. Chouinard Bros. Roofing] (workers) who perform the work described in the clarity note below as well as the metalmen who perform the work described in the clarity note below excluding non-working foremen, hourly service men, flat roofers, aluminum/vinyl applicators, persons engaged in re-roofing, office, warehouse/shop workers, clerical workers and persons above the rank of foreman, engaged in the application of shingles and other roofing materials in new subdivision work (three or more units) in residential low-rise buildings (defined as non-elevated housing of not more than four (4) stories in height excluding basement) in the Province of Ontario, save and except the industrial, commercial and institutional sector. For additional clarity custom homes are excluded" (225 employees in unit) *(Clarity Note)*

Number of names of persons on revised voters' list	26
Number of persons who cast ballots	26
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	15
Number of ballots marked in favour of intervener	11

Number of ballots segregated and not counted	0

0010-07-R: Sheet Metal Workers' International Association, Local 51 (Applicant) v. Chouinard Bros. Aluminum Ltd. (Respondent) v. Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Intervener)

Unit: "all construction workers of Chouinard Bros. Aluminum Ltd. engaged in new residential subdivision construction (defined as 3 or more units) in residential lowrise buildings (defined as non-elevated housing of not more than 4 storeys in height excluding basement) in the installation of aluminum and vinyl siding, eavestroughing, soffit and fascia, in the Province of Ontario, save and except the industrial, commercial and institutional sector, save and except non-working foremen and persons above the rank of non working foreman, and office and clerical staff" (12 employees in unit)

Number of names of persons on revised voters' list	3
Number of persons who cast ballots	1
Number of ballots excluding segregated ballots cast by persons whose names appear on voters list	0
Number of segregated ballots cast by persons whose names appear on voter's list	11
Number of segregated ballots cast by persons whose names do not appear on voters' list	3
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	4
Number of ballots marked in favour of intervener	3
Number of ballots segregated and not counted	4

1489-08-R: SEIU Local 2 - Brewery, General, and Professional Workers Union (Applicant) v. Impact Cleaning Services Ltd. (Respondent)

Unit: "all employees of Impact Cleaning Services Ltd. at 1911 Finch Avenue West, Toronto, save and except supervisors and persons above the rank of supervisor" (8 employees in unit)*(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	9
Number of persons who cast ballots	8
Number of ballots excluding segregated ballots cast by persons whose names	7
appear on voter's list	0
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	3
Number of ballots segregated and not counted	1

2067-08-R: Teamsters Local Union No. 938 (Applicant) v. UGL Unico (Respondent)

Unit: "all employees of UGL Unico working at 2489 North Sheridan Way in the City of Mississauga, n the province of Ontario, save and except supervisors, persons above the rank of supervisor, students office and clerical staff" (8 employees in unit)*(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	0
Number of persons who cast ballots	9
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	0

Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	9
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	6
Number of ballots marked against applicant	3
Number of ballots segregated and not counted	0

2173-08-R: Teamsters Local Union No. 419 (Applicant) v. Cara Operations Limited (Respondent) v. Teamsters Local Union 647, United Food and Commercial Workers International Union (UFCW Canada) (Interveners)

Unit: "all employees of Cara Operations Limited in its Airport Services Division Flight Kitchen #1, Flight Kitchen #2, Home Meal Replacement, and Trucking and Commissary at Lester B. Pearson International Airport, in the City of Mississauga, save and except supervisors, persons above the rank of supervisor and office staff" (1134 employees in unit)*(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	1051
Number of persons who cast ballots	662
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	655
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	6
Number of spoiled ballots	6
Number of ballots marked in favour of applicant	169
Number of ballots marked in favour of intervener	470
Number of ballots marked in favour of second intervener	10
Number of ballots segregated and not counted	7

2179-08-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. Résidence Royale Marquis Inc./Royal Marquis Retire ment Residence Inc. (Respondent)

Unit: "all employees of Résidence Royal Marquis Inc./Royal Marquis Retirement Residence Inc. in the City of Windsor, save and except supervisors, persons above the rank of supervisor, activity coordinator, administrative and sales staff" (24 employees in unit)

Number of names of persons on revised voters' list	25
Number of persons who cast ballots	18
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	17
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	13
Number of ballots marked against applicant	4
Number of ballots segregated and not counted	1

2194-08-R: National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) (Applicant) v. 689737 Ontario Ltd., Erin Park Automotive Limited o/a Erin Park Lexus Toyota (Respondent)

Unit: "all employees of Erin Park Automotive Limited o/a Erin Park Lexus Toyota in the City of Mississauga, save and except shop foreman, persons above the rank of shop foreman, commission sales staff, tower operators, office and clerical staff" (80 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	80
Number of persons who cast ballots	77
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	69
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	8
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	47
Number of ballots marked against applicant	23
Number of ballots segregated and not counted	7

2216-08-R: Iron Workers District Council of Ontario (Applicant) v. Fabtech Welding Inc. (Respondent)

Unit: "all employees of Fabtech Welding Inc. in the Municipality of Chatham-Kent, save and except supervisors, persons above the rank of supervisor, office, clerical and sales employees" (19 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	19
Number of persons who cast ballots	18
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	18
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	14
Number of ballots marked against applicant	4
Number of ballots segregated and not counted	0

2248-08-R: Ontario Nurses' Association (Applicant) v. 1245556 Ontario Inc. o/a Burton Manor (Respondent) v. Canadian Union of Public Employees (Intervener)

Unit: "all Registered Nurses and Nurses with temporary Certificate of Registration employed by 1245556 Ontario Inc. o/a Burton Manor in Brampton, save and except the Assistant Director of Care, and persons above the rank of the Assistant Director of Care" (13 employees in unit) *(Clarity Note)* (*Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	13
Number of persons who cast ballots	9
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	9
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of ballots marked in favour of applicant	9
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

2317-08-R: United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) (Applicant) v. Maple Leaf Consumer Foods Inc. (Respondent)

Unit: "all employees of Maple Leaf Consumer Foods Inc. at 97 Walker Drive in the City of Brampton, save and except Production Supervisors and persons above the rank of Production Supervisor, Industrial Engineers, Chief

Engineer, Project Engineers, office, clerical, sales and technical staff" (105 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	129
Number of persons who cast ballots	127
Number of ballots excluding segregated ballots cast by persons whose names	105
Number of segregated ballots cast by persons whose names appear on voter's list appear on voter's list	17
Number of segregated ballots cast by persons whose names do not appear on voters' list	5
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	79
Number of ballots marked against applicant	26
Number of ballots segregated and not counted	22

2333-08-R: National Automobile, Aerospace, Transportation and General Workers' Union of Canada (CAW-Canada) (Applicant) v. Coca-Cola Bottling Company (Respondent)

Unit: The bargaining unit the applicant seeks to capture are the 13 individuals who work as load checkers and otherwise referred to as auditors in this facility, other than gate auditors. all load checkers/auditors of Coca-Cola Bottling Company in Brampton, Ontario, save and except supervisors, persons above the rank of supervisor, gate auditors, office staff and students employed for the summer vacation" (14 employees in unit) *(Clarity Note) (Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	13
Number of persons who cast ballots	13
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	12
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	9
Number of ballots marked against applicant	3
Number of ballots segregated and not counted	1

2341-08-R: Teamsters Local Union No. 419 (Applicant) v. Versa Cold Logistics Services (Respondent)

Unit: "all employees of Versa Cold/Atlas Logistics Services in the City of Toronto, save and except supervisors, persons above the rank of supervisor, office and sales staff and those employees already covered by a Collective Agreement between Teamsters Local Union No. 419 and Versa Cold/Atlas Logistics Services" (37 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	37
Number of persons who cast ballots	32
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	32
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	23
Number of ballots marked against applicant	9
Number of ballots segregated and not counted	0

2348-08-R: Service Employees International Union Local 1 Canada (Applicant) v. Morriston Park Nursing Home Inc. (Respondent)

Unit: "all employees of Morriston Park Nursing Home Inc. in the Municipality of Puslinch, Ontario, save and except the Assistant Director of Care, persons above the rank of Assistant Director of Care and Registered Nurses" (41 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	41
Number of persons who cast ballots	35
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	34
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	29
Number of ballots marked against applicant	5
Number of ballots segregated and not counted	1

2355-08-R: Teamsters Canada Rail Conference (Applicant) v. Cando Rail Services Ltd. (Respondent)

Unit: "all employees, including team leaders, employed by Cando Rail Services Ltd. in the railway switching operations at the Vaughan Intermodal Terminal located at 6830 Rutherford Road, in Kleinburg, Ontario, save and except supervisors and those above the rank of supervisor" (19 employees in unit)

Number of names of persons on revised voters' list	23
Number of persons who cast ballots	21
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	21
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	21
Number of ballots marked against applicant	0
Number of ballots segregated and not counted	0

2369-08-R: Service Employees International Union Local 1 Canada (Applicant) v. Comcare Health Services (Respondent)

Unit: "all home support workers and personal support workers employed by Comcare Health Services in the City of Greater Sudbury and the Municipalities of Killarney, French River, Markstay-Warren and St. Charles, save and except registered nurses, office and clerical staff, supervisors and persons above the rank of supervisor" (60 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	65
Number of persons who cast ballots	65
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	65
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	47
Number of ballots marked against applicant	18
Number of ballots segregated and not counted	0

2404-08-R: Canadian Office and Professional Employees Union Local 343 (Applicant) v. Canadian Actors' Equity Association (Respondent)

Unit: "all employees of Canadian Actors' Equity Association in the City of Toronto, save and except the Executive Director, Controller, Communications Director, Senior Business Representative, Business Representative Manager, Assistant Controller IT, Senior Executive Assistants and persons above the rank of Senior Executive Assistant" (14 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	15
Number of persons who cast ballots	14
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	14
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	11
Number of ballots marked against applicant	3
Number of ballots segregated and not counted	0

2418-08-R: Teamsters Local Union 91 (Applicant) v. NASCO Building Cleaning Inc. (Respondent)

Unit: "all employees of NASCO Building Cleaning Inc. employed at the Chalk River and Deep River Laboratories of Atomic Energy Canada Limited ("AECL") in Chalk River and Deep River, Ontario, save and except supervisors and persons above the rank of supervisor" (40 employees in unit) *(Having regard to the agreement of the parties.)*

Number of names of persons on revised voters' list	46
Number of persons who cast ballots	41
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	41
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	22
Number of ballots marked against applicant	19
Number of ballots segregated and not counted	0

Applications for Certification Dismissed Without Vote

0670-07-R: United Brotherhood of Carpenters and Joiners of America, Local 18 (Applicant) v. Devlan Construction Ltd. (Respondent)

Applications for Certification Dismissed Subsequent to Vote

0653-08-R: IBEW Construction Council of Ontario (Applicant) v. Rigney Electric Limited (Respondent)

Unit: "all electricians, electricians' apprentices, all linemen and linemen apprentices, all network cabling specialists and network cabling specialists' apprentices, and communication cable installers in the employ of the responding party in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all electricians, electricians' apprentices, all linemen and linemen apprentices, all network cabling specialists and network cabling specialists' apprentices, and communication cable installers in the employ of the responding party in all other sectors of the construction industry in the County of Simcoe and the District Municipality of Muskoka, the County of Dufferin, and the County of Grey, save and except non-working foremen and persons above the rank of non-working foreman" (4 employees in unit)

Number of names of persons on revised voters' list	5
Number of persons who cast ballots	3
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	3
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	0
Number of ballots marked against applicant	3
Number of ballots segregated and not counted	0

1940-08-R: Sheet Metal Worker's International Association Local 540 (Applicant) v. Excel Steel Ltd. (Respondent)

Unit: "all employees of Excel Steel Ltd. in the City of Cambridge, save and except forepersons and persons above the rank of foreperson, office, clerical and sales staff." (18 employees in unit)

Number of names of persons on revised voters' list	18
Number of persons who cast ballots	17
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	11
Number of segregated ballots cast by persons whose names appear on voter's list	6
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	7
Number of ballots segregated and not counted	5

1963-08-R: United Food and Commercial Workers International Union, (UFCW Canada) (Applicant) v. Crowne Plaza Hotel Hamilton (Respondent)

Unit: "all employees at the Crowne Plaza Hotel in the City of Hamilton, Ontario, save and except Supervisors, those above the rank of Supervisor and Sales, Conference Services, Office, Clerical and Security Staff." (59 employees in unit)

Number of names of persons on revised voters' list	59
Number of persons who cast ballots	40
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	16
Number of segregated ballots cast by persons whose names appear on voter's list	23
Number of segregated ballots cast by persons whose names do not appear on voters' list	1

2172-08-R: United Food and Commercial Workers International Union (UFCW Canada) (Applicant) v. Cara Operations Limited (Respondent) v. Teamsters Local Union 647 (Intervener)

Unit: "all employees of Cara Operations Limited in its Airport Services Division Flight Kitchen #1, Flight Kitchen #2, Home Meal Replacement, and Trucking and Commissary at Lester B. Pearson International Airport, in the City of Mississauga, save and except supervisors, persons above the rank of supervisor and office staff" (1051 employees in unit)

Number of names of persons on revised voters' list	1051
Number of persons who cast ballots	662
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	655
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	6
Number of spoiled ballots	6
Number of ballots marked in favour of applicant	169
Number of ballots marked in favour of intervener	470
Number of ballots marked in favour of second intervener	10
Number of ballots segregated and not counted	7

2175-08-R: Retail, Wholesale and Department Store Union, District Council of the United Food and Commercial Workers International Union (Applicant) v. Evans Lumber and Builders Supply Limited (Respondent)

Unit: "all employees working for Evans Lumber and Builders Supply Limited in the City of Greater Sudbury, save and except Managers, persons above the rank of Manager, and office staff" (55 employees in unit)

Number of names of persons on revised voters' list	55
Number of persons who cast ballots	41
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	40
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	8
Number of ballots marked against applicant	33
Number of ballots segregated and not counted	0

2203-08-R: National Automobile, Aerospace, Transportation and General Workers' Union of Canada (CAW-Canada) (Applicant) v. Dover Cone (a division of Dover Industries Ltd.) (Respondent) v. LIUNA, Local 837 (Intervener)

Unit: "all employees of Dover Cone (a division of Dover Industries Ltd.) at its Burlington plant, save and except office and sales staff, the Production Manager, Plant Manager, Maintenance Manager, Maintenance Supervisor, Quality Control Supervisor, Quality Control Technician, Shift Supervisors, and persons above the rank of Shift Supervisor" (67 employees in unit)

Number of names of persons on revised voters' list	68
Number of persons who cast ballots	53
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	53
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	24
Number of ballots marked in favour of intervener	29
Number of ballots segregated and not counted	0

2254-08-R: Labourers' International Union of North America, Local 1059 (Applicant) v. Cadillac Industrial Cleaning Services Inc. (Respondent)

Unit: "all employees in the employ of Cadillac Duct Cleaning Inc. Cadillac Commercial Cleaning Services working in and out of the City of London, save and except office, clerical, sales and administrative staff and save and except supervisors and persons above the rank of supervisor" (7 employees in unit)

Number of names of persons on revised voters' list	9
Number of persons who cast ballots	7
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	6
Number of segregated ballots cast by persons whose names appear on voter's list	1
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	2
Number of ballots marked against applicant	4
Number of ballots segregated and not counted	1

2360-08-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Asbury Building Services Inc. (Respondent)

Unit: "all employees of Asbury Building Services Inc. employed at 277 Front Street West, in the City of Toronto, Ontario, save and except supervisors and persons above the rank of supervisor, office and clerical staff" (10 employees in unit)

Number of names of persons on revised voters' list	9
Number of persons who cast ballots	9
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	8
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	1
Number of spoiled ballots	0
Number of ballots marked in favour of applicant	4
Number of ballots marked against applicant	5
Number of ballots segregated and not counted	0

2422-08-R: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Bodyline Incorporated and, Bodyline Auto Recyclers (Respondents)

Unit: "all employees of Bodyline Incorporated and Bodyline Auto Recyclers employed at 185 Bancroft Street, Hamilton, Ontario, save and except office and clerical staff, sales staff, supervisors and persons above the rank of supervisor." (18 employees in unit)

Number of names of persons on revised voters' list	24
Number of persons who cast ballots	19
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	16
Number of segregated ballots cast by persons whose names appear on voter's list	3
Number of segregated ballots cast by persons whose names do not appear on voters' list	0

Applications for Certification Withdrawn

4039-06-R: Sheet Metal Workers' International Association, Local 51 (Applicant) v. E.P. Siding Inc. (Respondent) v. Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Intervener)

0374-07-R: Sheet Metal Workers' International Association, Local 51 (Applicant) v. GTA Aluminum Inc. (Respondent) v. Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Intervener)

0425-08-R: Ontario Public Service Employees Union (Applicant) v. Halton Multicultural Council (Respondent)

1590-08-R: Canadian Office and Professional Employees Union Local 343, (Applicant) v. Your Neighbourhood Credit Union (Respondent)

2437-08-R: Canadian Union of Public Employees (Applicant) v. Community Care East York (Respondent) v. Universal Workers Union, Labourers' International Union of North America Local 183 (Intervener)

2454-08-R: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. The Forzani Group Ltd. (Respondent)

2509-08-R: Canadian Union of Public Employees (Applicant) v. Compass Group Canada (Respondent) v. UNITE HERE Ontario Council (Intervener)

2535-08-R: Universal Workers Union, Labourers' International Union of North America, Local 183 (Applicant) v. Graham Bros. Construction Limited, Graham Bros. Aggregates Limited (Respondents)

2565-08-R: Canadian Union of Public Employees (Applicant) v. Student Federation of the University of Ottawa (Respondent)

APPLICATIONS FOR DECLARATION OF RELATED EMPLOYER

1554-05-R: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Crystal Glen Homes Inc. and/or, Crystal Glen Homes (2000) Inc. and/or, 1595397 Ontario Inc. (Respondents) *(Withdrawn)*

2051-07-R: Carpenters' Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Atria Development Corporation and, Parliament Building Group Inc. (Respondents) *(Granted)*

2538-07-R: Power Workers' Union-Canadian Union of Public Employees, Local 1000, C.L.C. (Applicant) v. Erie Thames Services Corporation, Erie Thames Solutions Inc., Erie Thames Power Corporation, Erie Thames Power Group of Companies, Abicus Management Solutions Inc./Oncor Utility Solutions (Canada) Company Limited and, Coulter Services Inc. (Respondents) *(Terminated)*

2890-07-R: Millwrights and Machine Erectors, Local 2309 (Applicant) v. Accu-Line Conveyor Inc. and, Centerline Installations (Respondents) *(Withdrawn)*

2891-07-R: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local Union 721 (Applicant) v. Accu-Line Conveyor Inc. and, Centerline Installations (Respondents) *(Withdrawn)*

3330-07-R: International Union of Bricklayers and Allied Craftworkers Local 2 (Applicant) v. Trinity Custom Masonry Limited, Clifford Masonry (Ontario) Limited,, Clifford Masonry Limited,, Clifford Restoration Limited (Respondents) v. Masonry Industry Employers' Council of Ontario (Intervener) *(Granted)*

3863-07-R: The Regional Municipality of Peel (Applicant) v. Canadian Union of Public Employees and its Local 966 ("CUPE Local 966") (Respondent) *(Terminated)*

0927-08-R: Labourers' International Union of North America, Local 506 (Applicant) v. Clifford Masonry Limited,, Clifford Masonry (Ontario) Limited,, Clifford Restoration Limited and, Trinity Custom Masonry Limited (Respondents) *(Granted)*

1175-08-R: Labourers' International Union of North America, Local 625 (Applicant) v. Jersey Excavating Inc., L.V. Concorde Contracting Inc. and, A.E. Belmont Inc. (Respondents)*(Withdrawn)*

1981-08-R: Power Workers' Union-Canadian Union of Public Employees, Local 1000, C.L.C. (Applicant) v. Erie Thames Services Corporation, ERTH Corporation,, CRU Solutions, E360, Erie Thames Powerlines and, E Caliber (Respondents) *(Terminated)*

2223-08-R: Bricklayers, Masons Independent Union of Canada Local 1, Universal Workers Union, Labourers' International Union of North America Local 183 and Masonry Council of Unions Toronto and Vicinity (Applicant) v. JKDK Masonry Inc. and/or, 1773050 Ontario Inc. (Respondents) *(Granted)*

2268-08-R: Sheet Metal Workers International Association, Local 47 (Applicant) v. Flynn Canada Inc. and, Leak Free Roofing (Respondents) *(Terminated)*

2313-08-R: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 721 (Applicant) v. D.J. Nash Construction & Maintenance Inc. and, Frankford Fabrication & Machining Inc. and, Dan Nash (Respondents) *(Withdrawn)*

SALE OF A BUSINESS

2086-06-R: Service Employees International Union, Local 1.on (Applicant) v. Extendicare Retirement Residence (Cobourg), Extendicare Retirement Residence (Port Hope),, Extendicare (Canada) Inc.,, Compass Group Inc. and, ELM Management (Respondents) v. Universal Workers Union, Labourers' International Union of North America, Local 183 (Intervener) *(Withdrawn)*

2787-06-R: Labourers' International Union of North America, Ontario Provincial District Council and Labourers International Union of North America and Labourers International Union of North America, Local 1059 (Applicant) v. Ontario Power Generation Inc., Mississagi Power Trust, Great Lakes Hydro Income Fund, Brookfield Asset Management Inc. and, Brookfield Power Corporation (Respondents) *(Withdrawn)*

2789-06-R: Canadian Union of Skilled Worker (Applicant) v. Ontario Power Generation Inc. Mississauga Power Trust, Great Lakes Hydro Income Fund, Brookfield Power Corporation and Brookfield Asset Management Inc., (Respondents) *(Withdrawn)*

2538-07-R: Power Workers' Union-Canadian Union of Public Employees, Local 1000, C.L.C. (Applicant) v. Erie Thames Services Corporation, Erie Thames Solutions Inc., Erie Thames Power Corporation, Erie Thames Power Group of Companies, Abicus Management Solutions Inc./Oncor Utility Solutions (Canada) Company Limited and, Coulter Services Inc. (Respondents) *(Terminated)*

2890-07-R: Millwrights and Machine Erectors, Local 2309 (Applicant) v. Accu-Line Conveyor Inc. and, Centerline Installations (Respondents) *(Withdrawn)*

2891-07-R: International Association of Bridge, Structural, Ornamental and Reinforcing IronWorkers, Local Union 721 (Applicant) v. Accu-Line Conveyor Inc. and, Centerline Installations(Respondents) *(Withdrawn)*

3330-07-R: International Union of Bricklayers and Allied Craftworkers Local 2 (Applicant) v. Trinity Custom Masonry Limited,, Clifford Masonry (Ontario) Limited,, Clifford Masonry Limited,, Clifford Restoration Limited (Respondents) v. Masonry Industry Employers' Council of Ontario (Intervener) *(Granted)*

3863-07-R: The Regional Municipality of Peel (Applicant) v. Canadian Union of Public Employees and its Local 966 ("CUPE Local 966") (Respondent) *(Terminated)*

0927-08-R: Labourers' International Union of North America, Local 506 (Applicant) v. Clifford Masonry Limited,, Clifford Masonry (Ontario) Limited,, Clifford Restoration Limited and, Trinity Custom Masonry Limited (Respondents) *(Granted)*

1162-08-R: Corporation of the County of Essex (Essex-Windsor Emergency Medical Services)(Applicant) v. Canadian Union of Public Employees and its Local 2974.1;, Service Employees International Union, Local 1.ON and/or Service Employees International Union, Local 1 Canada; Ontario Public Service Employees' Union, Local 143; and, Harrow Ambulance Employees'
Association (Respondents) *(Granted)*

1175-08-R: Labourers' International Union of North America, Local 625 (Applicant) v. JerseyExcavating Inc., L.V. Concorde Contracting Inc. and, A.E. Belmont Inc. (Respondents)*(Withdrawn)*

1821-08-R: Communications, Energy and Paperworkers Union of Canada, Locals 528, 528-1 and 255 (Applicant) v. Norampac Inc., Red Rock Division, Red Rock Mill Inc. (Respondents) *(Withdrawn)*

1981-08-R: Power Workers' Union-Canadian Union of Public Employees, Local 1000, C.L.C. (Applicant) v. Erie Thames Services Corporation,, ERTH Corporation,, CRU Solutions, E360, Erie Thames Powerlines and, E Caliber (Respondents) *(Terminated)*

2223-08-R: Bricklayers, Masons Independent Union of Canada Local 1, Universal Workers Union, Labourers' International Union of North America Local 183 and Masonry Council of Unions Toronto and Vicinity (Applicant) v. JKDK Masonry Inc. and/or, 1773050 Ontario Inc. (Respondents) *(Granted)*

2268-08-R: Sheet Metal Workers International Association, Local 47 (Applicant) v. Flynn Canada Inc. and, Leak Free Roofing (Respondents) *(Terminated)*

2313-08-R: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 721 (Applicant) v. D.J. Nash Construction & Maintenance Inc. and, Frankford Fabrication & Machining Inc. and, Dan Nash (Respondents) *(Withdrawn)*

APPLICATIONS FOR DECLARATION TERMINATING BARGAINING RIGHTS

3404-06-R: Christian Bourgeois (Applicant) v. The International Brotherhood of Electrical Workers, Local 586 (Respondent) v. Regulvar Canada Inc./Régulvar Inc. (Intervener) *(Granted)*

Unit: "all electricians and electricians' apprentices, all linemen and linemen apprentices, all network cabling specialists and network cabling specialists' apprentices, and communication cable installers in the employ of the responding party in the industrial, commercial and institutional sector of the construction industry in the Province of Ontario and all electricians and electricians' apprentices, all linemen and linemen apprentices, all network cabling specialists and network cabling specialists' apprentices, and communication cable installers in the employ of the responding party in all other sectors of the construction industry in the City of Ottawa and the United Counties of Prescott and Russell, save and except non-working foremen and persons above the rank of non-working foreman." (1 employee in unit)

Number of names of persons on revised voters' list	1
Number of persons who cast ballots	1
Number of ballots excluding segregated ballots cast by persons whose names	
Number of segregated ballots cast by persons whose names appear on voter's list	7
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0

Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	1
Number of ballots segregated and not counted	0

2092-07-R: Bev Park (Applicant) v. UNITE HERE Ontario Council and its Local 1070-T (Respondent) v. Glendale Distribution Inc. (Intervener) *(Withdrawn)*

Unit: "all of the employees of Glendale Distribution Inc. at its Hamilton, Ontario Mill, save and except supervisors and persons above the rank of supervisor and persons acting in a supervisory capacity having authority to hire, discharge, suspend or otherwise effect changes in he status of employees, quality control staff, students temporarily employed during school vacation periods, temporary employees, office employees and persons regularly employed for not more than 24 hours per week" (27 employees in unit)

Number of names of persons on revised voters' list	27
Number of persons who cast ballots	25
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	22
Number of segregated ballots cast by persons whose names appear on voter's list	3
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	9
Number of ballots marked against respondent	13
Number of ballots segregated and not counted	3

0410-08-R: Nicolette (Nikki) Gosselin (Applicant) v. United Food and Commercial Workers Canada, Local 175 (Respondent) v. Norfoam Ltd. (Intervener) *(Dismissed)*

Unit: "all employees of Norfoam Ltd. at the Northam Industrial Park in the town of Cobourg, Ontario, save and except supervisors and those above the rank of supervisors" (12 employees in unit)

Number of names of persons on revised voters' list	13
Number of persons who cast ballots	12
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	9
Number of segregated ballots cast by persons whose names appear on voter's list	3
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	5
Number of ballots marked against respondent	4
Number of ballots segregated and not counted	3

2182-08-R: Pam Bellis (Applicant) v. Teamsters Local Union No. 91 (Respondent) *(Granted)*

Unit: "all bus drivers employed by Loyalist Bus Lines Limited working in and out of 507B Ashley Street, Foxboro, Ontario, save and except supervisors, persons above the rank of supervisor, full-time dispatchers, mechanics, monitors, owners, sales and full-time office clerical staff" (4 employees in unit)

Number of names of persons on revised voters' list	4
Number of persons who cast ballots	4
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	4
Number of segregated ballots cast by persons whose names appear on voter's list	0

Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	0
Number of ballots marked against respondent	4
Number of ballots segregated and not counted	0

2205-08-R: Jaswinder Dhillon (Applicant) v. United Steelworkers of America Local 9042-85 Respondent) v. Canroof Corporation Inc. (Brampton) (Intervener) *(Dismissed)*

Unit: "all employees at Rutherford Road, Brampton, Ontario, save and except foremen, persons above the rank of foreman, office and sales staff, security guards, persons working less than 24 hours per week and students employed during the school vacation period" (9 employees in unit)

Number of names of persons on revised voters' list	9
Number of persons who cast ballots	9
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	9
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	6
Number of ballots marked against respondent	3
Number of ballots segregated and not counted	0

2295-08-R: Mark Penlington (Applicant) v. Canadian Office and Professional Employees Union, Local 343 (Respondent) v. Carpenters and Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Intervener) *(Granted)*

Unit: "all clerical employees" (6 employees in unit)

Number of names of persons on revised voters' list	6
Number of persons who cast ballots	6
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	6
Number of segregated ballots cast by persons whose names appear on voter's list	0
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	1
Number of ballots marked against respondent	5
Number of ballots segregated and not counted	0

2301-08-R: Dean Funston (Applicant) v. S.E.I.U. Local 2 ON, Brewery, General and Professional Workers' Union (Respondent) *(Terminated)*

2328-08-R: Emmanuel Omari (Applicant) v. Teamsters Local Union # 419 (Respondent) *(Dismissed)*

2350-08-R: Airline Financial Credit Union Ltd. (Applicant) v. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers) Local 9042-65 (Respondent) *(Terminated)*

2364-08-R: Tammy Goodwin (Applicant) v. United Food & Commercial Workers Canada, Local 175(Respondent) v. T.J. Manufacturing Enterprises Inc. (Intervener) *(Granted)*

Unit: "all employees of the Employer in Ontario, save and except foreperson, persons above the rank of foreperson, office and clerical staff, and students employed during the school vacation period" (9 employees in unit)

Number of names of persons on revised voters' list	9
Number of persons who cast ballots	9
Number of ballots excluding segregated ballots cast by persons whose names appear on voter's list	7
Number of segregated ballots cast by persons whose names appear on voter's list	2
Number of segregated ballots cast by persons whose names do not appear on voters' list	0
Number of spoiled ballots	0
Number of ballots marked in favour of respondent	1
Number of ballots marked against respondent	6
Number of ballots segregated and not counted	2

2433-08-R: Robert Monty & the employees of Lafarge Construction Materials (Applicant) v. United Steelworkers Local 1-2693, formerly I.W.A. Canada Local 2639 (Respondent) v. Lafarge Construction Materials (Intervener) *(Dismissed)*

2445-08-R: Kelly Marion (Applicant) v. United Food and Commercial Workers International Union, Local 175 (Respondent) *(Dismissed)*

2491-08-R: Trevor Laundrie (Applicant) v. Labourers' International Union of North America, Local 527 (Respondent) *(Dismissed)*

COMPLAINTS OF UNFAIR LABOUR PRACTICE

0472-04-U: International Brotherhood of Electrical Workers, Local 105 and I.B.E.W. Construction Council of Ontario (Applicant) v. Ernie Pickard and, JLY Electric Ltd. (Respondents) v. Construction Workers, Local 6 Affiliated with Christian Labour Association of Canada (Intervener) *(Dismissed)*

2568-05-U: Lynn Marie Leckie (Applicant) v. United Steelworkers of America (Local 260) (Respondent) *(Terminated)*

1156-06-U: Service Employees International Union Local 1.on ("SEIU") (Applicant) v. The Corporation of the County of Simcoe ("Georgian Manor") (Respondent) *(Withdrawn)*

1720-06-U: Fernanda Bianco (Applicant) v. Service Employees International Union, Local 1.on (Respondent) v. Humber River Regional Hospital (Intervener) *(Dismissed)*

3782-06-U: Service Employees International Union - Local 1.on (Applicant) v. Extendicare Retirement Residence (Cobourg), Extendicare Retirement Residence (Port Hope),, Extendicare (Canada) Inc.,, Compass Group Inc. and, ELM Management (Respondents) *(Withdrawn)*

0757-07-U: Teamsters Local Union No. 938 (Applicant) v. Stock Transportation Ltd. (Respondent) *(Withdrawn)*

0941-07-U: International Brotherhood of Electrical Workers, Local 105 (Applicant) v. Rassaun Steel & Manufacturing Co. Ltd. (Respondent) *(Terminated)*

1027-07-U: Stock Transportation Ltd. (Applicant) v. Teamsters Local Union 938 (Respondent) *(Withdrawn)*

1770-07-U: Scott Wayland (Applicant) v. Thomson Products Employees' Association (Respondent) *(Dismissed)*

2098-07-U: Rose Palladino Greco (Applicant) v. Canadian Union of Public Employees, Local 79 (Respondent) v. The City of Toronto (Intervener) *(Dismissed)*

2580-07-U: UNITE HERE Ontario Council and its Local 1070-T (Applicant) v. Glendale Distribution Inc. and, David Hamby (Respondents) *(Withdrawn)*

2879-07-U; 2881-07-U: Babak Ghanizadeh (Applicant) v. Canadian Union of Public Employees Local One (Respondent) v. Toronto Hydro-Electric Systems Limited (Intervener), Masoud Haghdoust (Applicant) v. Canadian Union of Public Employees Local One (Respondent) v. Toronto Hydro-Electric Systems Limited (Intervener) *(Dismissed)*

3297-07-U: Ivan Rahija (Applicant) v. International Union of Operating Engineers, Local 772 (Respondent) v. Coppley Apparel Group (Intervener) *(Dismissed)*

3303-07-U: The Ontario Public Service Employees Union (Applicant) v. Canadian Blood Services (Respondent) *(Withdrawn)*

3674-07-U: Brian Tweedie (Applicant) v. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union (United Steelworkers), Local 2699-05 (Respondent) v. London Precision Machine & Tool Co. (Intervener) *(Dismissed)*

3708-07-U: Universal Workers Union, L.I.U.N.A., Local 183 (Applicant) v. Waterford Building Maintenance Inc. (Respondent) *(Withdrawn)*

0110-08-U: Canadian Union of Public Employees and its Local 1356 (Applicant) v. York University (Respondent) *(Withdrawn)*

0317-08-U: Marilyn Bosnell (Applicant) v. Service Employees International Union Local 1 Canada (Respondent) *(Dismissed)*

0563-08-U: David Wayne Smith (Applicant) v. CAW Local 1987 (Respondent) v. Pan-Oston Ltd. (Intervener) *(Dismissed)*

0606-08-U; 0842-08-U: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. 4373413 Canada Inc. c.o.b. Canadian Masonry Corporation (Respondent), 4373413 Canada Inc. c.o.b. Canadian Masonry Corporation (Applicant) v. Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Respondent) *(Withdrawn)*

0697-08-U: Kelly Ralph Roberts (Applicant) v. Ontario Secondary School Teachers' Federation - District 14 (Respondent) *(Withdrawn)*

0702-08-U; 1206-08-U; 1841-08-U: The Ontario Public Service Employees Union (Applicant) v. Halton Multicultural Council (Respondent) *(Withdrawn)*

0772-08-U: Richard Haslam (aka Rick Haslam) (Applicant) v. CUPE Local #2286 CUPE Ontario CUPE National Windsor Essex Children's Aid Society (Respondent) *(Dismissed)*

0889-08-U: Vesna Hance (Applicant) v. Teamsters Local Union No. 419 (Respondent) *(Dismissed)* 0965-08-U: Canadian Union of Public Employees and its Local 4866 (Applicant) v. Lennox and Addington Family and Children Services (Respondent) *(Withdrawn)*

0965-08-U: Canadian Union of Public Employees and its local 4866 (Applicant)v. Lennox and Addington Family and Children Services (Respondent). *(Withdrawn)*

0994-08-U: Canadian Union of Public Employees Local 4308 (Applicant) v. Toronto Homemaking Service (Respondent) *(Withdrawn)*

1013-08-U: Labourers' International Union of North America, Local 625 (Applicant) v. L.V. Concorde Contracting Inc. (Respondent) *(Withdrawn)*

1063-08-U: Canadian Union of Public Employees and its Local 4811 (Applicant) v. Trilogy Long Term Care Centre (Respondent) *(Withdrawn)*

1339-08-U: Independent Canadian Extrusion Workers Union (Applicant) v. CCL Containers (Respondent) *(Withdrawn)*

1503-08-U: International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 721 (Applicant) v. 764215 Ontario Inc. operating as North Steel and, Hans Walter (Respondents) *(Withdrawn)*

1641-08-U: Labourers' International Union of North America, Local 625 (Applicant) v. Black and McDonald Limited (Respondent) *(Granted)*

1740-08-U: Cloke-Kirby Construction Limited (Applicant) v. United Brotherhood of Carpenters and Joiners of America, Local 397 and Ken Savoie (Respondent) *(Withdrawn)*

1917-08-U: Service Employees International Union Local 2, Brewery, General & Professional Workers' Union (Applicant) v. Italian Trade Commission (Respondent) *(Withdrawn)*

1922-08-U: United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 787 (Applicant) v. 6166784 Canada Inc. o/a JTM Contracting (Respondent) *(Withdrawn)*

2029-08-U: Michel Bertrand (Applicant) v. OPSEU Local 659 (Respondent) v. Hôpital Régional de Sudbury Regional Hospital (Intervener) *(Terminated)*

2130-08-U: Carpenters Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America (Applicant) v. J.D. Strachan Construction Limited (Respondent) *(Withdrawn)*

2162-08-U: Angela Schmidt (Applicant) v. CUPE LOCAL 4700 (Respondent) *(Withdrawn)*

2237-08-U: York University (Applicant) v. Canadian Union of Public Employees and Canadian Union of Public Employees, Local 1356 (Respondent) *(Withdrawn)*

2264-08-U: United Food and Commercial Workers International Union (UFCW Canada) (Applicant) v. Teamsters Local Union No. 419 and, Teamsters Canada (Respondents) *(Withdrawn)*

2377-08-U: UNITE HERE IU Employees in Ontario: Baer, Nadia; Bakhazi, Kamal; Bayon, Melisa, Fueser, JJ; Hardy, Ashley, Hollin, Marc; Lue, Valrie; Neatby, Stu; Warsame, Guled; Yerex, Jay; Zerehi, Sima (Applicant) v. Federation of Union Representatives (FOUR) (Respondent) *(Dismissed)*

2429-08-U: Labourers' International Union of North America, Local 1059 (Applicant) v. Cadillac Industrial Cleaning Services Inc. (Respondent) *(Withdrawn)*

APPLICATIONS FOR CONSENT TO EARLY TERMINATION OF COLLECTIVE AGREEMENT

2225-08-M: Durham District School Board (Applicant) v. Canadian Union of Public Employees And its Local 218 (Office/Clerical/Technical Bargaining Unit) (Respondent) *(Granted)*

2226-08-M: Durham District School Board (Applicant) v. Canadian Union of Public Employees And its Local 218 (Educational Assistants Bargaining Unit) (Respondent) *(Granted)*

2227-08-M: Durham District School Board (Applicant) v. Canadian Union of Public Employees And its Local 218 (Custodial Bargaining Unit) (Respondent) *(Granted)*

2231-08-M: Le Conseil scolaire public du Nord-Est de l'Ontario (Applicant) v. Syndicat canadien de la fonction publique, Section locale 4865 (Respondent) *(Granted)*

2233-08-M: The Windsor Essex Catholic District School Board (Applicant) v. National Automobile, Aerospace, Transportation and General Workers Union Of Canada (CAW-Canada) and its Local 2458 Custodians and Maintenance Bargaining Unit (Respondent) *(Granted)*

2234-08-M: The Windsor Essex Catholic District School Board (Applicant) v. National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and its Local 2458 Office Clerical & Technician Bargaining Unit (Respondent) *(Granted)*

2244-08-M: The District School Board of Niagara (Applicant) v. Association of Professional Student Services Personnel (Niagara Chapter) (Respondent) *(Granted)*

2252-08-M: Le Conseil scolaire de district catholique du Centre-Sud (Applicant) v. Syndicat canadien de la fonction publique et sa section locale 4340 (Respondent) *(Granted)*

2258-08-M: The Hamilton-Wentworth District School Board (Applicant) v. Canadian Union of Public Employees and its Local 4153 (Respondent) *(Granted)*

2304-08-M: The Windsor Essex Catholic District School Board (Applicant) v. The Canadian Union of Public Employees and Its Local 1358.2 Special Services Unit (Respondent) *(Granted)*

2305-08-M: The Windsor Essex Catholic District School Board (Applicant) v. The Canadian Union of Public Employees, Local 1358.1 Educational Assistant Group (Respondent) *(Granted)*

2307-08-M: Le Conseil scolaire de district du Centre-Sud-Ouest (Applicant) v. L'Association des enseignantes et des enseignants franco-ontariens (Respondent) *(Granted)*

2330-08-M: Trillium Lakelands District School Board (Applicant) v. Canadian Union of Public Employees, Local 997 Office, Clerical, Technical and Educational Assistant (Respondent) *(Granted)*

2331-08-M: Trillium Lakelands District School Board (Applicant) v. Canadian Union of Public Employees, Local 997 Custodial and Maintenance Bargaining Unit (Respondent) *(Granted)*

2332-08-M: Niagara Catholic District School Board (Applicant) v. Canadian Union of Public Employees Local 1317 (Respondent) *(Granted)*

2386-08-M: The St. Clair Catholic District School Board (Applicant) v. The Canadian Union of Public Employees, Local 4168 (Respondent) *(Granted)*

2396-08-M: York Region District School Board (Applicant) v. Canadian Union of Public Employees Local 1196 (Respondent) *(Granted)*

2424-08-M: Lambton Kent District School Board (Applicant) v. Canadian Union of Public Employees and Its Local 1238 (Respondent) *(Granted)*

2488-08-M: Le Conseil scolaire du district catholique des Aurores boréales (Applicant) v. L'Association des enseignantes et des enseignants franco-ontariens (Respondent) *(Granted)*

JURISDICTIONAL DISPUTES

1336-06-JD: Labourers' International Union of North America, Local 506 (Applicant) v. The Carpenters and Allied Workers,Local 27, United Brotherhood of Carpenters and Joiners of America, and, The Board of Governors of Exhibition Place (Respondents) *(Terminated)*

0251-08-JD; 0253-08-JD: International Brotherhood of Electrical Workers, Local 1739 (Applicant) v. Western Mechanical Electrical Millwright Services Ltd. and, Millwright Regional Council of Ontario and Millwrights Local 2309, United Brotherhood of Carpenters and Joiners of America (Respondents) *(Granted)*

1181-08-JD: P.G. Simon, Inc. (Applicant) v. Labourers' International Union of North America, Local 1059 and, International Union of Allied Trades Ontario Provincial Council (Respondents) *(Withdrawn)*

APPLICATIONS FOR DETERMINATION OF EMPLOYEE STATUS

2878-07-M; 2880-07-M: Babak Ghanizadeh (Applicant) v. Toronto Hydro-Electric Systems Limited (Respondent) v. Canadian Union of Public Employees Local One (Intervener) Masoud Haghdoust (Applicant) v. Toronto Hydro-Electric Systems Limited (Respondent) v. Canadian Union of Public Employees Local One (Intervener) *(Dismissed)*

COMPLAINTS UNDER THE OCCUPATIONAL HEALTH AND SAFETY ACT

1629-06-OH: Jamie Craig (Applicant) v. Craigs Fencing (Respondent) *(Terminated)*

2755-06-OH: Jake Noland (CAW - Local 598) (Applicant) v. Frank Pilkington (Xsrata Nickel Supervisor) (Respondent) *(Withdrawn)*

1104-07-OH: Ken Honsberger (Applicant) v. F&M Caulking Limited (Respondent) *(Withdrawn)*

3527-07-OH: Andrew Watson (Applicant) v. The Town of Richmond Hill, Steve Kraft, Harry Oosterhof, Jim Hadwen (Respondents) *(Dismissed)*

1180-08-OH: Andrew Watson (Applicant) v. The Town of Richmond Hill, Steve Kraft, Shane Baker, Dave Barrow, Joan Anderton and (Respondents) *(Dismissed)*

CONSTRUCTION INDUSTRY GRIEVANCES

1527-05-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Floorcraft Design Inc. (Respondent) *(Withdrawn)*

1352-07-G; 1353-07-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. F&M Caulking Limited (Respondent) *(Withdrawn)*

2087-07-G: Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America (Applicant) v. APM Construction Ontario (Respondent) *(Endorsed Settlement)*

2088-07-G: Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America (Applicant) v. APM Construction Ontario (Respondent) *(Endorsed Settlement)*

2123-07-G: Carpenters and Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. APM Construction Ontario (Respondent) *(Endorsed Settlement)*

2813-07-G: Sheet Metal Workers International Association, Local 47 (Applicant) v. Sani Metal Ltd. (Respondent) *(Terminated)*

2822-07-G: Sheet Metal Workers' International Association, Local 30 (Applicant) v. A-1 CladdingLtd. (Respondent) *(Granted)*

3078-07-G: Universal Workers Union, L.I.U.N.A. Local 183 (Applicant) v. Paramount Concrete Ltd. (Respondent) *(Endorsed Settlement)*

0250-08-G; 0252-08-G: International Brotherhood of Electrical Workers, Local 1739 (Applicant) v. Western Mechanical Electrical Millwright Services Ltd. (Respondent) *(Withdrawn)*

0306-08-G: Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America (Applicant) v. M.J. Dixon Construction Limited (Respondent) *(Withdrawn)*

0516-08-G: Labourers' International Union of North America, Local 506 (Applicant) v. Minty-Carter Masonry Inc. (Respondent) *(Endorsed Settlement)*

0638-08-G: Labourers' International Union of North America, Local 506 (Applicant) v. Minty-Carter Masonry Inc. (Respondent) *(Endorsed Settlement)*

0816-08-G: Universal Workers Union, Labourers' International Union of North America, Local 183 (Applicant) v. Hydro One Networks Inc. (Respondent) *(Withdrawn)*

1408-08-G: Universal Workers Union, Labourers' International Union of North America, Local 183 (Applicant) v. Hydro One Inc./, Hydro One Networks Inc. (Respondents) *(Withdrawn)*

1414-08-G: Universal Workers Union, Labourers' International Union of North America, Local 183 (Applicant) v. Hydro One Inc./, Hydro One Networks Inc. (Respondents) *(Withdrawn)*

1549-08-G: International Brotherhood of Electrical Workers, Local 773 (Applicant) v. Greater Essex County District School Board (Respondent) *(Withdrawn)*

1868-08-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. AXA Electric Inc. (Respondent) *(Granted)*

1878-08-G: International Brotherhood of Electrical Workers, Local 586 (Applicant) v. 1146557 Ontario Inc. o/a Vickers Utility Services and Vickers Electric Limited (Respondent) *(Granted)*

1993-08-G: Sheet Metal Workers' International Association, Local Union No. 285 (Applicant) v. International Heating Ltd. (Respondent) *(Endorsed Settlement)*

2082-08-G: International Brotherhood of Electrical Workers, Local 804 (Applicant) v. 1594313 Ontario Ltd. c.o.b. as SB Electrical Services (Respondent) *(Endorsed Settlement)*

2100-08-G: Universal Workers Union, Labourers' International Union of North America Local 183 (Applicant) v. Co-X-Co Construction Limited (Respondent) *(Withdrawn)*

2142-08-G: United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, Local 221 (Applicant) v. Modern Niagara Ottawa Inc (Respondent) *(Withdrawn)*

2199-08-G: Sheet Metal Workers' International Association, Local 30 (Applicant) v. Flexmaster Canada Limited (Respondent) *(Withdrawn)*

2204-08-G: International Brotherhood of Electrical Workers, Local 894 (Applicant) v. Gridd Electrical Services Inc. (Respondent) *(Terminated)*

2222-08-G: Carpenters & Allied Workers, Local 27, United Brotherhood of Carpenters and Joinersof America (Applicant) v. D. Gambini Carpenters Ltd. (Respondent) *(Endorsed Settlement)*

2224-08-G: Greater Ontario Regional Council of Carpenters, Drywall and Allied Workers, Local Union 93 (Applicant) v. 1252085 Ontario Inc. c.o.b. as Dan Blais Carpets and Flooring (Respondent) *(Endorsed Settlement)*

2240-08-G: Construction Workers Local 6 affiliated with the Christian Labour Association of Canada (Applicant) v. Aim Environmental Group (Respondent) *(Withdrawn)*

2241-08-G: Sheet Metal Workers' International Association Local Union 30, (Applicant) v. E.S. Fox Limited, (Respondent)

2269-08-G: Sheet Metal Workers International Association, Local 47 (Applicant) v. Flynn Canada Inc. and, Leak Free Roofing (Respondents) *(Terminated)*

2292-08-G: Brick and Allied Craft Union of Canada Local 5 (Applicant) v. Gall Construction of America Acapulco Pools Limited (Respondent) *(Endorsed Settlement)*

2299-08-G: Sheet Metal Workers' International Association, Local 30 (Applicant) v. Altec Sheet Metal Inc. (Respondent) *(Granted)*

2309-08-G: International Brotherhood of Electrical Workers, Local 105 (Applicant) v. Sirron Electrical Contractor Corp. o/a Sirron Electrical Contracting (Respondent) *(Granted)*

2336-08-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v.Westview Electric Contractors Inc. (Respondent) *(Granted)*

2340-08-G: Drywall Acoustic Lathing and Insulation Local 675, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Nortec Inc. (Respondent) *(Withdrawn)*

2351-08-G: International Brotherhood of Electrical Workers, Local 353 (Applicant) v. E.M.C.S. Controls Inc. (Respondent) *(Withdrawn)*

2365-08-G: Carpenters & Allied Workers Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Rex Lumber Corporation (Respondent) *(Granted)*

2368-08-G: United Brotherhood of Carpenters and Joiners of America, Local 93, Local 249, Local 397, Local 446, Local 494, Local 785, Local 1669, Local 1946, Local 1988, Local 2222, Local 2486 hereinafter known as "Carpenter Local Unions participating in the OPC Trust Funds") (Applicant) v. CY Rheault Construction Ltd. (Respondent) *(Granted)*

2370-08-G: International Brotherhood of Electrical Workers Local Union 1687 (Applicant) v. Ontario Electrical Construction Company Limited (Respondent) *(Terminated)*

2374-08-G: United Brotherhood of Carpenters and Joiners of America, Local 93, Local 249, Local 397, Local 446, Local 494, Local 785, Local 1669, Local 1946, Local 1988, Local 2222, Local 2486 hereinafter known as "Carpenter Local Unions participating in the OPC Trust Funds") (Applicant) v. Terrastone Construction Inc. (Respondent) *(Granted)*

2446-08-G: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Exterior Wall Systems Limited (Respondent) *(Granted)*

2447-08-G: The International Union of Painters and Allied Trades, Local Union 1795 (Applicant) v. Clegg Glass (2008) Inc. (Respondent) *(Granted)*

2452-08-G: Labourers' International Union of North America, Local 506 (Applicant) v. C.A.P. Concrete Structures Ltd. (Respondent) *(Granted)*

2479-08-G: The International Union of Painters and Allied Trades, Local Union 1819 (Applicant) v. Pro Glass Services Inc. (Respondent) *(Granted)*

2510-08-G: Labourers' International Union of North America, Local 1059 (Applicant) v. Raven Construction Management Inc. (Respondent) *(Terminated)*

2528-08-G: The International Union of Painters and Allied Trades, Local Union 1891 (Applicant) v. Jose Pires c.o.b. as La Vitesse Drywall & Taping (Respondent) *(Granted)*

2529-08-G: Carpenters & Allied Workers, Local 27, United Brotherhood of Carpenters and Joiners of America (Applicant) v. Westend Carpentry Ltd. (Respondent) *(Granted)*

2549-08-G: Carpenters' Union, Central Ontario Regional Council, United Brotherhood of Carpenters and Joiners of America, Local 675 (Applicant) v. Tampa Interior Systems Inc. (Respondent) *(Withdrawn)*

APPEALS - EMPLOYMENT STANDARDS ACT

1145-06-ES: Ralph De Pasquale (Applicant) v. Loconte Meat Markt. Ltd. and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3196-06-ES: Mr. Luther Moore (Applicant) v. Peterbilt of North Bay and, Director of Employment Standards (Respondents) *(Terminated)*

1264-07-ES: 1135196 Ontario Inc. operating as Howard's Pawn Shop/Howard's Buy Sell Trade (Applicant) v. Michael Lorbetskie, Director of Employment Standards (Respondents) *(Granted)*

1379-07-ES: Thomas Nelson (Applicant) v. Dean Albert Eve o/a Purple Painter, Director of Employment Standards (Respondents) *(Dismissed)*

1631-07-ES: 1394629 Ontario Inc. o/a Sears Carpet & Upholstery Cleaning / Sears Maid Services (Applicant) v. Julie Turpin and, Director of Employment Standards (Respondents) *(Granted)*

2242-07-ES: John A. Krug (Applicant) v. Topeco Coffee and Tea Company, and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2439-07-ES: Syed Mohammad Zubair Ali (Applicant) v. Netcor Communications International Inc., and, Director of Employment Standards (Respondents) *(Granted)*

2565-07-ES: Tara MacKenzie (Applicant) v. Cryptometrics Canada Incorporated, and, Director of Employment Standards (Respondents) *(Terminated)*

2634-07-ES: Noble Metal Processing Canada, Inc. (Applicant) v. Brett Stacy and, Director of Employment Standards (Respondents) *(Dismissed)*

2818-07-ES: Richard Pereira (Applicant) v. SEIU - Service Employees International Union and, Director of Employment Standards (Respondents) *(Dismissed)*

2834-07-ES: 5-0 Taxi Co. Inc. (Applicant) v. Eric Young, Director of Employment Standards (Respondents) *(Granted)*

3071-07-ES: 2092728 Ontario Inc. o/a Business Cards Tomorrow (Applicant) v. Judy Steriadis and, Director of Employment Standards (Respondents) *(Dismissed)*

3135-07-ES: Metro College of Technology (Applicant) v. Qing Yang and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

3341-07-ES: Guillaume Dionne Blanchet (Applicant) v. 6459595 Canada Inc. o/a Cera-Wood and, Director of Employment Standards (Respondents) *(Granted)*

3801-07-ES: 2126189 Ontario Inc. o/a Café Kinoo (Applicant) v. Brigitte Campeau and, Directorof Employment Standards (Respondents) *(Granted)*

0065-08-ES: Dream Tire Limited (Applicant) v. Donald Sweeney, and, Director of Employment Standards (Respondents) *(Dismissed)*

0109-08-ES: Hans Harry derven Felix (Applicant) v. Bluegenesis.Com Corp. and, Director of Employment Standards (Respondents) *(Dismissed)*

0118-08-ES: Muhoiddin Jahid (Applicant) v. Yousaf Halal Meat Supermarket Ltd. and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

0119-08-ES: Jamal Ud Din Jahid (Applicant) v. Yousaf Halal Meat Supermarket Ltd. and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

0472-08-ES: 2014647 Ontario Ltd. o/a The Black Dog Pub (Applicant) v. Stephen Cameron and, Director of Employment Standards (Respondents) *(Granted)*

0618-08-ES: John Daniels (Applicant) v. Dr. Michael Blackmore and, Director of Employment Standards (Respondents) *(Granted)*

0758-08-ES: Caina-Longbranch Defence Systems (Canada) Limited (Applicant) v. Kimberly Crane and, Director of Employment Standards (Respondents) *(Dismissed)*

0802-08-ES: Norampac Inc. (Applicant) v. Kevin St. Amant, and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

0836-08-ES: Dale Schaaf (Applicant) v. Flanagan Foodservice Inc. and, Director of Employment Standards (Respondents) *(Withdrawn)*

0861-08-ES: Sleep Country Canada (Applicant) v. Jason Batten and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

0872-08-ES: Lafarge Canada Inc. (Applicant) v. Randy J. Ferrier and, Director of Employment Standards (Respondents) *(Granted)*

0873-08-ES: 2077042 Ontario Inc. o/a Cottages at the Pointe (Applicant) v. Lucas Reynolds and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

0957-08-ES: 1529150 Ontario Inc. o/a The Staffing Connection (Applicant) v. Glen Osborne and, Director of Employment Standards (Respondents) *(Granted)*

1068-08-ES: Maxtech Manufacturing Inc. (Applicant) v. Sudhir Ved and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1031-08-ES: 620369 Ontario Inc. o/a Herman's Building Centres (Applicant). v. Stephen Reuter and Director of Employment Standards. (Respondents)

1104-08-ES: Cheroz/Niagara Family Inn 2126925 Ontario Inc. (Applicant) v. David Glennie and, Director of Employment Standards (Respondents) *(Granted)*

1299-08-ES: Ashleigh Ridley (Applicant) v. Noorani Holdings Ltd. o/a Holiday Inn Express and, Director of Employment Standards (Respondents) *(Terminated)*

1537-08-ES: Dallov Holdings Limited o/a Maple Villa Long Term Care Centre (Applicant) v. Colleen Taylor and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1593-08-ES: Lucky Amengialue (Applicant) v. KW Transportation Services and (Respondent) *(Withdrawn)*

1644-08-ES: Arman E. Hoque (Applicant) v. Amanda Ramlall, and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1687-08-ES: Chatham Chrysler Jeep Dodge Inc. (Applicant) v. Brooke Marie Ross and, Director of Employment Standards (Respondents) *(Granted)*

1743-08-ES: Andrew Samatas (Applicant) v. Annan & Bird Lithographers, Inc. o/a Annan & Bird Lithographers and, Director of Employment Standards (Respondents) *(Withdrawn)*

1760-08-ES: Pamela Salter (Applicant) v. Stackpole Limited and, Director of Employment Standards (Respondents) *(Withdrawn)*

1791-08-ES: Rubicon Publishing Inc. (Applicant) v. Victoria Cigan and, Director of Employment Standards (Respondents) *(Granted)*

1823-08-ES: Full Service Maintenance. (Applicant). v. Douglas DaSilva and Director of Employment Standards. (Respondents) *(Endorsed Settlement)*

1869-08-ES: Pure Laser Hair Removal and Treatment Clinic Inc. o/a Pure Med Spa (Applicant) v. Carolina Rayo and, Director of Employment Standards (Respondents) *(Granted)*

1893-08-ES: Mohammad Kasim (Applicant) v. Canpaco Inc. and, Director of Employment Standards (Respondents) *(Dismissed)*

1894-08-ES: 1364279 Ontario Inc. o/a Bank Street Kia (Applicant) v. Erin Daschuk and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1895-08-ES: Hamilton Building Maintenance Inc. (Applicant) v. Thomas Balen, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

1896-08-ES: Dennis J. Leonard (Applicant) v. Gilbert C. Storey Machinery Ltd. and, Director of Employment Standards (Respondents) *(Dismissed)*

2010-08-ES: Jamie Inkster (Applicant) v. Pickard Construction Inc. 1991 and, Director of Employment Standards (Respondents) *(Withdrawn)*

2037-08-ES: Franca Giordano (Applicant) v. Complex Services Inc. o/a Niagara Fallsview Casino Resort and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2074-08-ES: Gemma Communications Corp. (Applicant) v. Tex Tony Martin and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2103-08-ES: Metro Val Consulting Corp. (Applicant) v. Alona Aizenshted and, Director of Employment Standards (Respondents) *(Endorsed Settlement)*

2106-08-ES: Mark Roberts (Applicant) v. Royal Lepage Parnters Ltd. and, Director of Employment Standards (Respondents) *(Dismissed)*

2338-08-ES: Windsor Match Plate & Tool Limited (Applicant) v. Andy Casagrande and, Director of Employment Standards (Respondents) *(Terminated)*

2339-08-ES: Windsor Match Plate & Tool Limited (Applicant) v. Sean Dupuis and, Director of Employment Standards (Respondents) *(Terminated)*

2352-08-ES: Linda Bacskai (Applicant) v. Willard Lake Resort Motel and, Director of Employment Standards (Respondents) *(Dismissed)*

2411-08-ES: Don Ritchie (Applicant) v. Nexinnovations Inc. and, Director of Employment Standards (Respondents) *(Dismissed)*

2464-08-ES: 1604549 Ontario Ltd. o/a West Toronto Kia (Applicant) v. Kathleen Patraniuk and, Director of Employment Standards (Respondents) *(Dismissed)*

2465-08-ES: 1604549 Ontario Ltd. o/a West Toronto Kia (Applicant) v. Lennox Ho and, Director of Employment Standards (Respondents) *(Dismissed)*

APPEALS - OCCUPATIONAL HEALTH AND SAFETY ACT

1704-08-HS: Toronto West Detention Centre (Applicant) v. Ontario Public Service Employees Union and, Robert Rae, Inspector (Respondents) *(Withdrawn)*

2150-08-HS: National Steel Car (Applicant) v. United Steel Workers of America, Local 7135, John Pierroz, Inspector (Respondents) *(Granted)*

2303-08-HS: Dynamic Properties Inc. (Applicant) v. Rick Carpenter, Josie Roque, and,Dave MacDonald, Inspector (Respondents) *(Dismissed)*

2534-08-HS: Everett English (Applicant) v. Dan Joslin, Inspector (Respondent) *(Dismissed)*

FIRST AGREEMENT - DIRECTION

1659-08-FC: Labourers' International Union of North America, Ontario Provincial District Council (Applicant) v. Henry Heyink Construction Ltd. (Respondent) *(Terminated)*

PAY EQUITY ACT

0095-08-PE: City of Greater Sudbury (Applicant) v. Canadian Union of Public Employees and its Local 4705 (Inside Unit) (Respondent) *(Withdrawn)*

0435-08-PE: Canadian Union of Public Employees and its Local 4705 (Inside Unit) (Applicant) v. City of Greater Sudbury (Respondent) *(Withdrawn)*

1140-08-PE: Kirk Windibank (Applicant) v. Corporation of the City of Windsor (Respondent) *(Dismissed)*

REFERRAL FROM MINISTER

2400-08-M: Cara Operations Limited (Applicant) v. Teamsters Local Union No. 419, and, Milk & Bread Drivers, Dairy Employees, Caterers and Allied Employees, Local 647 (Respondents) *(Withdrawn)*

APPLICATIONS FOR RECONSIDERATION OF BOARD'S DECISION

0072-05-OH: Anthony James (Applicant) v. Toronto Transit Commission (Respondent) *(Dismissed)*

1452-07-EP: Ted Cooper (Applicant) v. City of Ottawa (Respondent) *(Dismissed)*

2101-07-ES: Robert McLaughlin (Applicant) v. Graphite Specialty Products Inc. and/or Ferns Golf & Country Club and, Director of Employment Standards (Respondents) *(Dismissed)*

1897-08-ES: F.C.M. Construction Limited (Applicant) v. Thurman Green, Director of Employment Standards (Respondents) *(Dismissed)*

2109-08-ES: The International Union of painters and Allied Trades, Local Union 1891 (Applicant) v. Aromi Contracting Corporation, Aromi Fx Inc., 1100261 Ontario Inc. o/a Aromi Group, and/or 800838 Ontario Inc. (Respondents)

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